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In The

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY
POLICE DEPARTMENT,

Petitioner,

v.

EDWARD R. WILLIAMS;
ANGELYNNE WILLIAMS, H/W,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICK J. HARVEY
Counsel of Record
DAVID E. BRIER
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 864-8116

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Third Circuit err in following the analysis of the First Circuit, in conflict with the Fifth, Sixth, Eighth and Ninth Circuits, that a "regarded as" disabled plaintiff is entitled to a reasonable accommodation within the meaning of the Americans with Disabilities Act?

2. Did the Third Circuit err in finding that "law enforcement" is a "class of jobs" that may support a substantial limitation in the major life activity in working under the Americans with Disabilities Act, despite this Court's requirement that a plaintiff show a limitation in a "broad class of jobs" and Williams' failure to identify the jobs in "law enforcement" or the qualifications for such jobs?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Philadelphia Housing Authority Police Department ("PHA") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit, entered on August 26, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 380 F.3d 751 (3d Cir. 2004), and is reproduced in the Appendix to this Petition ("App.") at App. A-1. The Court of Appeals' order denying the petition for rehearing *en banc*, dated September 23, 2004, is unpublished and is reproduced at App. A-90. The memorandum of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of petitioner is published at 230 F. Supp. 2d 631 (E.D. Pa. 2002), and is reproduced at App. A-48. The memorandum of the United States District Court for the Eastern District of Pennsylvania denying respondent's motion for reconsideration is unpublished, reported as 2002 WL 31859439 (E.D. Pa. Dec. 18, 2002), and is reproduced at App. A-82.

JURISDICTION

The Court of Appeals entered judgment on August 26, 2004, and denied a timely petition for rehearing *en banc* on September 23, 2004. App. A-90. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following sections of the Americans with Disabilities Act:

Section 3((2))Definitions

The term 'disability' means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A)-(C).

Title I, Section 101(8) Qualified Individual With A Disability

The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(8).

Title I, Section 101(9) Reasonable Accommodation

> The term 'reasonable accommodation' may include –
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

Title I, Section 102(a) General Rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Title I, Section 102(b)(5)(A) Construction

> As used in subsection (a) of this section, the term 'discriminate' includes –
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such

> covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A).

STATEMENT OF THE CASE

This is an employment case that arises under the Americans with Disabilities Act (ADA). Respondent, Edward R. Williams alleges that PHA discharged him from employment based on a mental impairment (depression) in violation of the ADA. Williams alleges that he was "disabled" within the meaning of the ADA because (i) his mental impairment substantially limited him in the major life activity of working, or (ii) that PHA erroneously regarded him as substantially limited in the major life activity of working. Williams claims that PHA failed to provide him with a reasonable accommodation, in the form of a transfer to a temporary assignment in PHA's radio room, that would have prevented his termination from employment.

The district court granted PHA's motion for summary judgment because, among other reasons, Williams had failed to establish that he was "disabled" within the meaning of the ADA. On August 26, 2004, the Third Circuit vacated in part the district court's grant of summary judgment to PHA. The Third Circuit held, in relevant part, that Williams established a question of fact as to (i) whether he was actually disabled from working in the "class of jobs" in "law enforcement", and (ii) whether PHA regarded Williams as substantially limited from

working in "law enforcement." The Third Circuit further held that the ADA requires an employer to provide reasonable accommodations to an employee who is erroneously "regarded as" disabled. As a result, the Third Circuit vacated the district court's grant of summary judgment on Williams' failure to accommodate claim. The Third Circuit affirmed the grant of summary judgment on Williams' retaliation claim under the ADA.

The Philadelphia Housing Authority (the "Authority"), a public agency, provides affordable housing to low income residents within the City of Philadelphia. The Authority employs a police department to provide police services to the residents of the Authority's housing units. The Authority's police officers are required to carry firearms and are authorized to enforce the law as well as arrest suspected criminals. At the time of his separation from employment, the Authority employed Williams as a sergeant in its police department.

On December 29, 1998, PHA terminated Williams' employment after Williams failed to respond to a letter from PHA's human resources department that invited him to extend his leave of absence. Williams' leave of absence had resulted from a violent confrontation between Williams and his superiors, Captain Geiger and Captain Hunter, on May 19, 1998. The night of the confrontation, PHA received a report that Williams talked of "going postal" and "smoking people." The City of Philadelphia Police Department had been summoned to Williams' home based on a report of Williams' threatening statements.

The instant litigation focused upon Williams' attempt to return to active employment during the summer and

fall of 1998. PHA required that an independent psychologist, Dr. Laurene Finley, evaluate Williams prior to his return to active police duties. In her first letter, dated September 21, 1998, Dr. Finley wrote that Williams could not return to active police duty unless he received proper medical treatment, but that he could work in alternative work assignments. The only alternative position available was in the PHA radio room, where Williams would have had access to firearms. In a second letter, dated October 10, 1998, Dr. Finley wrote that she anticipated that Williams would be able to resume his police duties in 90 days, and that he could work around others who carry firearms.

Notwithstanding Dr. Finley's opinion, PHA declined to place Williams in the radio room based on safety concerns. Specifically, given Dr. Finley's position that Williams could not carry a firearm for safety reasons, PHA was unwilling to take the risk of placing him in a position where he would have had access to firearms. Instead, PHA invited Williams to complete the 90 days of treatment suggested by Dr. Finley and then to rejoin the PHA police department.

During the 90-day period following Dr. Finley's initial letter, Williams claims that he received counseling from his treating psychologist, Dr. Marjorie Levitt, from a group called "Cops Helping Cops," and from his mother. Dr. Levitt, however, denied that she treated Williams during this time. Williams never informed anyone at PHA about this alleged treatment. He also admits that he never informed PHA of the progress of his treatment. PHA did not know if Williams sought any treatment during the 90-day period.

On December 3, 1998, Carl Marinelli, PHA's Assistant General Manager, Human Resources, wrote Williams regarding his employment status. Williams received this letter on or about December 5, 1998. Mr. Marinelli wrote that Williams had exhausted all his leave time at PHA, and that he had to request a medical leave of absence to maintain his employment. Mr. Marinelli wrote that if he did not receive the request for leave of absence by December 18, 1998, PHA would terminate William's employment. Mr. Marinelli listed his telephone number in his letter, but Williams never responded to Mr. Marinelli's letter.

On December 29, 1998, Mr. Marinelli wrote Williams to inform him of his termination from employment based on his failure to respond to Mr. Marinelli's earlier letter. In sum, PHA terminated Williams' employment because Williams failed to request a leave of absence, failed to respond to Carl Marinelli's letter, and failed to inform PHA of the progress of his treatment during the 90-day period as suggested by Dr. Finley. Thus, Williams easily could have avoided the termination of his employment by requesting a leave of absence, as suggested by Mr. Marinelli in his December 3, 1998 letter.

According to Williams' evidence, Williams was unable to work as an active police officer for a temporary period of time, but he could have worked in other law enforcement functions. Although PHA denied Williams a reassignment to the radio room, PHA: (i) invited Williams to return to work as a police officer, and (ii) offered him a leave of absence that would have allowed him to return to police work. Thus, PHA's "state of mind" was a willingness to return Williams to police work (possibly within 90 days).

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split As To Whether An Employer Must Provide A Reasonable Accommodation To Employees Who Are Mistakenly Regarded As Substantially Limited In A Major Life Activity.

PHA files this petition to address an important issue that has split the circuits: whether a "regarded as" disabled employee is entitled to a reasonable accommodation under the ADA. Under the ADA, an individual is "regarded as" disabled when "(1) a covered entity mistakenly believes that a person has a physical [or mental] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). The ADA proscribes many forms of discrimination, including the failure to provide reasonable accommodations "to the known physical or mental limitations of an otherwise qualified individual with a disability. . . . " 42 U.S.C. § 12112(b)(5)(A).

Contrary to the decisions of four other circuit courts, the Third Circuit concluded that a "regarded as" disabled employee is entitled to a reasonable accommodation. *See Williams*, 380 F.3d at 775; *but see Kaplan v. North Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003) (holding that a "regarded as" plaintiff is not entitled to reasonable accommodations); *Weber v. Strippit, Inc.*, 186 F.3d 907, 915-17 (8th Cir. 1999) (holding that "regarded as" disabled employees are not entitled to reasonable accommodations under the ADA); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (affirming jury verdict in favor of plaintiff but noting that "regarded as" disabled plaintiffs are not entitled to reasonable accommodations); *Newberry*

v. E. Texas State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (holding that "an employer need not provide reasonable accommodations to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment").

In the decision below, the Third Circuit recognized that these four other circuits had reached contrary results on this same issue. *See Williams*, 380 F.3d at 773 (citations omitted) (stating "[t]his presents an issue that is one of first impression in this Circuit and has occasioned a circuit split elsewhere"). The Third Circuit chose to follow the analysis of the First Circuit and of several district courts that have examined the same issue. *See id.* (citing *Katz v. City Medal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (other citations omitted)).

Even the Third Circuit has shown some inconsistency on this important issue, in that prior Third Circuit decisions have suggested, in *dicta*, a result contrary to the result reached by the *Williams* panel. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138 (3d Cir. 1998) (*en banc*). In *Deane*, the Third Circuit granted a petition for rehearing *en banc* after a panel ruled that an employer is *not* obligated to accommodate a "regarded as" disabled employee. *See id.* at 140-41. Thus, the *Deane* panel reached the opposite conclusion from the *Williams* panel on the same issue. The *en banc* court in *Deane* did not reach this issue, but characterized the issue as one "of much greater difficulty" and "the more difficult question." *See Deane*, 142 F.3d at 140, 148 n.12. In *Deane*, Judge Becker outlined the parties' respective positions on the issue, and "acknowledge[d] the considerable force of . . . [the employer's] argument." *Id.* at 148 n.12. In dissent, Judge Greenberg argued that, under most circumstances, a "regarded as" disabled employee is

not entitled to a reasonable accommodation. *See id.* at 149-50. Two subsequent Third Circuit panels have repeated Judge Becker's analysis from *Deane*. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) ("[I]t seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to an accommodation."); *see also Buskirk v. Apollo Metals*, 307 F.3d 160, 169 n.2. (3d Cir. 2002) (noting the circuit split on this issue).

Moreover, the better analysis of the ADA, as set forth by the Ninth Circuit in *Kaplan*, is that a "regarded as" disabled employee is not entitled to reasonable accommodations. *See Kaplan*, 323 F.3d at 1231-33; *see also* Michelle A. Travis, *Leveling The Playing Field Or Stacking The Deck? The "Unfair Advantage" Critique Of Perceived Disability Claims*, 78 N.C.L. Rev. 901, 902-71 (April 2000) (arguing that "perceived as disabled" plaintiffs should be ineligible for traditional accommodations based on an analysis of the statutory text, legislative intent, and EEOC guidelines).[1]

Contrary to the Third Circuit's conclusion, the statutory language is ambiguous as to whether a "regarded as"

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[1] After concluding that a "regarded as" disabled employee is not entitled to traditional accommodations, Professor Travis proposes that such employees receive alternative "educational" accommodations and remedies other than lost pay and reinstatement. *See* Travis, 78 N.C.L. Rev. at 985-1011. The four circuit courts that have decided this issue have not adopted this proposal. Furthermore, this proposal is inconsistent with Professor Travis' thorough analysis of the reasons why a "regarded as" disabled employee is *not* entitled to reasonable accommodations.

disabled employee is entitled to reasonable accommodations. *See* Travis, 78 N.C.L. Rev. at 935 (writing that "most courts have granted perceived disability plaintiffs the right to reasonable accommodations by mechanically applying the definition of 'qualified individual' to all discrimination claims, whether actual or perceived. In fact, the statutory language is far more ambiguous"); *see also Kaplan*, 323 F.3d at 1232 (rejecting a "formalistic" reading of the ADA in this context). The ambiguity arises from reading together the various provisions of the ADA that address the duty to accommodate, the definition of "disability," and the prohibition against discrimination.

The ADA prohibits discrimination "because of the disability," which includes the failure to make "reasonable accommodations to *the known physical or mental limitations* of an otherwise qualified individual with a disability. . . . " 42 U.S.C. §§ 12112(a) & 12112(b)(5)(A) (emphasis added). The statutory language leaves open whether an employer must accommodate any limitation, or only the "known limitations" that result from the ADA disability. As Professor Travis concluded, the better view is that the duty to accommodate only extends to those "known limitations" that result from the impairment that gives rise to the disability. *See* Travis, 78 N.C.L. Rev. at 935-36. An employer who fails to accommodate a non-disabling impairment does not discriminate "because of the disability" because the non-disabling impairment is not the basis of the individual's protected status. Taken together, the statutory language is ambiguous as to whether the misperceived limitations of a "regarded as" disabled employee are "known limitations" that must be accommodated.

Contrary to the Third Circuit, the legislative intent suggests that "regarded as" disabled employees are not

entitled to reasonable accommodations for their non-disabling impairments. The congressional intent behind that ADA was to "level the playing field" for the disabled. *See* Travis, 78 N.C.L. Rev. at 938-45. For an individual with an actual disability, the duty to accommodate serves to remove the impairment as a barrier to employment and allows the employee to compete with the non-disabled. *See id.* (citations omitted). For a "regarded as" disabled plaintiff, the employee is placed on a "level playing field" by removing the incorrect perception from the employer's mindset. *Id.* For such an employee, accommodations are not necessary to "level the playing field" because the limitations caused by the individual's impairment, by definition, do not rise to a substantial limitation on a major life activity. *Id.*

Furthermore, it is unclear whether Congress considered this precise issue during legislative deliberations. Professor Travis traces how the "piecemeal" development of the ADA's predecessor, the Rehabilitation Act of 1973, suggests that Congress did not consider whether a "regarded as" disabled employee should be entitled to reasonable accommodations. *See id.* at 939-42. As originally passed, the Rehabilitation Act applied only to those with actual disabilities and included the obligation to provide reasonable accommodations. *See id.* (footnotes omitted). One year later, Congress amended the act to add protection to those "regarded as" substantially limited in a major life activity. *See id.* Professor Travis concludes that "[t]here is no evidence that Congress considered whether the qualification standards made sense for perceived disabilities, even though the core

concept of 'reasonable accommodations' had been created solely with actual disabilities in mind." *Id.* at 939-40.[2]

As recognized in *Kaplan*, *Deane*, and other cases, the right to reasonable accommodations in this context would lead to "bizarre" results and "windfalls." *See Deane*, 142 F.3d at 148 n.12; *see also Kaplan*, 323 F.3d at 1232-33; Travis, 78 N.C.L. at 955-71. This results from the different rights afforded to two employees with similar limitations that do not rise to an actual disability, but only one of whom is wrongfully "regarded as" substantially limited in a major life activity. Under this hypothetical, the employee whose condition is misperceived enjoys greater rights than the employee whose condition is accurately understood. The first employee enjoys the "windfall" solely because of the incorrect perception, while the second employee does not enjoy any rights under the ADA. In fact, the "windfall" perpetuates the incorrect assessment of the employee's condition by tying a benefit to the misperception.

The Ninth Circuit explained that "perverse" results would arise from granting a right to reasonable accommodation in this context:

> If we were to conclude that 'regarded as' plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. *This would be a perverse and troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly*

[2] Professor Travis likewise explains that this Court did not address this precise issue in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288-89 (1987), because *Arline* did not address a perceived disability claim. *See* Travis, 78 N.C.L. Rev. at 933 n.125.

> *indicative of the individual ability of [people with disabilities].*' 42 U.S.C. § 12107(a)(7). Dispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments. Were we to entitle "regarded as" employees to reasonable accommodations, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers misperceptions of a disability.

Kaplan, 323 F.3d at 1232 (emphasis added) (internal citation omitted) (citing *Pathmark Stores, Inc.*, 177 F.3d at 196).

Similarly, the Third Circuit's emphasis on the ADA interactive process highlights that the duty to provide reasonable accommodations should *not* apply to a "regarded as" disabled plaintiff. *Williams*, 380 F.3d at 771-72. The Third Circuit reasoned that PHA should have engaged in an interactive process with Williams so as to learn his accurate medical condition and limitations. *See id.* Under this analysis, however, the interactive process should serve to deprive the employee of the right to reasonable accommodation. The goal of the interactive process is "'*to identify the precise limitations* resulting from the disability and the potential reasonable accommodations that could overcome those limitations.'" *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 311 (3d Cir. 1999) (emphasis added) (quoting 29 C.F.R. § 1630.2(o)(3)). Following this theory for a "regarded as" disabled employee, the employer

would learn the accurate limitations, if any, about the employee's medical condition (*i.e.* the employee's "precise limitations") and conclude that the employee's impairment does not substantially limit any major life activity. At that point, the employee would have no right to a reasonable accommodation under the ADA, and the employer's decision to provide or deny the assistance would fall outside the ADA. This irony suggests that the right to receive a reasonable accommodation does not extend to "regarded as" disabled employees.

In a recent decision, the Seventh Circuit recognized the above split in the circuits and suggested that there are flaws in the Third Circuit's analysis. *See Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335-36 (7th Cir. 2004). Although the Seventh Circuit declined to reach the issue, Judge Easterbrook suggested, in *dicta*, that the Third Circuit's analysis is inconsistent with this Court's analysis in *Sutton*. The Seventh Circuit wrote as follows:

> Being regarded as disabled is a form of disability under the statute and thus could in principle trigger a duty to accommodate, but what must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee? *Suppose an employer wrongly believed that anyone who needs glasses is disabled under the ADA. Nearsighted employees at that firm might be "regarded as disabled," but it is hard to imagine that, despite Sutton (which held that correctable eye problems are not actually disabling), the employer would have to afford them the sort of accommodations appropriate to a genuine disability.*

Id. (emphasis added).

PHA respectfully requests that this Court grant its petition to resolve this split among the circuits on this important issue.

B. The Third Circuit's Analysis Of The Evidence Needed To Prove A Substantial Limitation In Working Is Inconsistent With Sutton.

In reaching its conclusion, the Third Circuit relied on an EEOC regulation to conclude that for purposes of showing a substantial limitation in the major life activity of working, a plaintiff may meet his burden by showing an inability to work in a "class of jobs." *Williams*, 380 F.3d at 764. The Third Circuit held that Williams established a question of fact as to whether his actual or misperceived limitations constituted a substantial limitation in the ability to work in "law enforcement," which the court concluded was a "class of jobs" within the meaning of the EEOC regulation. *Id.* at 763-65 (citations omitted). PHA files this petition because the Third Circuit's analysis is inconsistent with the analysis of this Court in *Sutton v. United Air Lines*. *See Sutton*, 527 U.S. at 489-94.

In *Sutton*, this Court discussed the evidence needed to prove that an employer regards an employee as substantially limited in the major life activity of working. *See id.* (affirming grant of motion to dismiss the complaint). The plaintiffs in *Sutton* alleged that the employer mistakenly believed that their uncorrected vision precluded them from working in the job of "global airline pilot," which they argued was a "class of employment." *See id.* at 490. This Court rejected the plaintiffs' argument because "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are

unable to work in a *broad class of jobs*." *Id.* at 491 (emphasis added). This Court reasoned that there were other jobs available to the plaintiffs, such as regional pilot or pilot instructor, that utilized their skills. *See id.* at 493.

With respect to the EEOC regulation at issue, the *Sutton* Court wrote that the EEOC lacked authority to issue regulations that interpret and implement the generally applicable provisions of the ADA, including the regulation on the definition of "disability." *See id.* at 478-81. The Court did not decide the amount of deference owed to these unauthorized regulations. *see id.*; *see also Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 513 n.4 (3d Cir. 2001) (noting that the *Sutton* court concluded that the EEOC lacked authority to implement the definitional portions of the ADA, but declined to rule on the amount of deference owed to such regulations).

Here, the Third Circuit's conclusion that "law enforcement" is a "class of jobs" that can support an ADA disability in working gave unreasonable deference to the relevant EEOC regulation and is inconsistent with the analysis in *Sutton*. *Sutton* requires the limitation in the ability to work to extend to a "broad class of jobs" and not just "one type of job." *Sutton*, 527 U.S. at 491-92. The Third Circuit's analysis would allow ADA claims to proceed for limitations that fall far short of a "broad class of jobs," and is therefore inconsistent with *Sutton*.

In this regard, the Third Circuit's analysis is inconsistent with the many circuit courts that have held that an inability to perform certain police work is not a substantial limitation in working under *Sutton*. *See Rossbach v. City of Miami*, 371 F.3d 1354, 1360-62 (11th Cir. 2004) (holding that the inability to work as a police officer is not an ADA

disability because work as a police officer does not constitute a "class of jobs") (citing decisions with similar holdings by the Eighth, First, Fourth, and Second Circuits); *see also Sloan v. City of Pittsburgh*, No. 03-4121, 2004 WL 1932633, at *4 (3d Cir. Aug. 31, 2004) (affirming grant of summary judgment because police officer who was cleared to perform all light duty work that did not involve carrying a gun was not substantially limited in the ability to work under *Sutton*) (non-precedential). These circuit court decisions reflect the rule in *Sutton* that the limitation in the ability to work must extend to a "broad class of jobs" in order to constitute a "substantial limitation."

Here, Williams' claim fails under *Sutton* because he did not establish that "law enforcement" is a "broad class of jobs." That is, he did not produce evidence to define the jobs in the "class" of "law enforcement," show the qualifications for the jobs in "law enforcement," or show that his actual or perceived restrictions precluded him from working in "law enforcement." Rather, as for his actual limitations, Williams' position was that he could perform some (or all) police work, including work in the PHA radio room. Indeed, according to Dr. Finley's conclusions, Williams could perform some police work. As for PHA's alleged erroneous perceptions, PHA precluded Williams from working in jobs that required an ability to work with or around firearms, but not "law enforcement" jobs that do not require firearms. Just as the plaintiffs in *Sutton* could work as regional pilots or as pilot instructors, Williams could perform law enforcement work that did not involve access to firearms, such as security work or corrections. Williams did not establish the jobs in the classification of "law enforcement," let alone that all such jobs require access to firearms.

The Third Circuit's reliance on "law enforcement" to bootstrap a disability claim for Williams was inconsistent with the analysis in *Sutton* and has the potential to greatly expand the scope of plaintiffs who may sue under the ADA. PHA respectfully requests that this Court grant this petition to address this significant misapplication of *Sutton*.

CONCLUSION

PHA respectfully requests that this Court grant its petition for a writ of certiorari to resolve the conflict which exists between various courts of appeals, concerning whether a "regarded as" disabled plaintiff is entitled to a reasonable accommodation within the meaning of the Americans with Disabilities Act, to reverse the Third Circuit's legal conclusion which resulted in an unworkable finding that such a plaintiff is entitled to such an accommodation within the meaning of the Act, and to clarify that an ADA plaintiff who relies on the major life activity of working must produce evidence to show an inability to work in a "broad class of jobs."

Respectfully submitted,

PATRICK J. HARVEY
Counsel of Record
DAVID E. BRIER
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 864-8116

Counsel for Petitioner

December 22, 2004

APPENDIX A

PRECEDENTIAL

IN THE UNITED STATES COURT
OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-1158

EDWARD R. WILLIAMS;
ANGELYNNE WILLIAMS, H/W

v.

PHILADELPHIA HOUSING
AUTHORITY POLICE DEPARTMENT,

Edward R. Williams,
Appellant.

On Appeal from the United States
District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 00-cv-01709)
District Judge:
Hon. Eduardo C. Robreno

Argued January 27, 2004

BEFORE: NYGAARD, FUENTES and
STAPLETON,*Circuit Judges*

(Opinion Filed: August 26, 2004)

Alex H. Pierre (Argued)
1315 Walnut Street – Suite 210
Philadelphia, PA 19107-4705
Attorney for Appellant.

Patrick J. Harvey
David E. Brier (Argued)
Ballard, Spahr, Andrews & Ingersoll
1735 Market Street – 51st Floor
Philadelphia, PA 19103-7599
Attorneys for Appellee.

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, prohibits covered employers from discriminating against qualified individuals on the basis of their disabilities. Edward Raymond Williams was unable to carry a firearm as the result of a mental condition, and was additionally perceived by his employer to be unable to have access to firearms, or be around others carrying firearms. Granting summary judgment in favor of the Philadelphia Housing Authority ("PHA"), Williams's employer, the District Court held that such limitations would not make Williams significantly restricted in the major life activity of working because they did not prevent him from performing work in a broad range of jobs in various classes. Because the District Court did not consider whether such limitations would prevent Williams from performing work in a class of jobs, and because a reasonable jury could conclude that Williams was actually (or perceived to be) precluded from working in a class of jobs, we will now reverse that grant of summary judgment and remand Williams's ADA discrimination claim

(and corresponding claim under the Pennsylvania Human Relations Act) for further proceedings. We will affirm the District Court's determination with respect to Williams's retaliation claims because Williams has not proffered sufficient evidence to support a retaliation claim.

I. *Factual and Procedural Background*

A. The Facts Viewed in the Light Most Favorable to Williams

Williams was hired by PHA as a police officer and worked for PHA for 24 years until his termination. On May 19, 1998, shortly after arriving for an evening shift, Williams received a page to report to the sergeant's office of PHA's police department. After being confronted by a superior officer about his fractious interactions with other employees, Williams yelled and made a number of profane and threatening remarks.

Williams was immediately suspended without pay. Later that evening, he called a counselor with Delaware County Psychological Services, and remarked, "I understand why people go postal." According to a PHA police officer who later spoke with the counselor, Williams talked of "smoking people, going postal, and having the means to do it."

Two days after the confrontation, PHA wrote to Williams and directed him to report to the PHA radio room for duty. Williams did not return to work, but instead began to call in sick on a daily basis. On June 25, 1998, PHA ordered Williams to undergo a psychological examination with its psychologist, Dr. Lauren Finley.

The parties agree that, sometime in June or July 1998, Williams submitted an application for a medical leave of absence from July 2, 1998 through August 28, 1998. The

request included a "medical certification form" completed by Helen Huffington, M.S.S., a counselor with Delaware County Psychological Services, who diagnosed Williams as suffering from "Major Depression, recurrent, severe." A198. PHA approved the request. On July 29, 1998, PHA Assistant Chief Aaron Hughes wrote to Williams regarding his employment status. Hughes wrote, "As of August 20, 1998, you will have exhausted all of your sick leave and annual leave benefits. Therefore, you will have to request through memorandum a leave of absence. . . . [F]ailure to do so will mean that you have voluntarily resigned as a member of this police department." A197. Williams would again be asked, on September 22, 1998, to apply for a leave of absence, and did so.

On August 17, 1998, Williams's personal psychologist, Dr. Marjory Levitt, wrote a letter to Hughes regarding Williams. The letter stated, in pertinent part:

> Sgt. Edward R. Williams, Sr., has requested that I write to you and report on his readiness to return to full time employment beginning August 20, 1998.
>
> Sgt. Williams states that he is fully prepared physically and psychologically to resume his professional duties. He assures me that he is emotionally stable and able to perform reliably and fulfill his responsibilities. He is not taking any psychotropic medications and denies other substance use, with the exception of a medication for hypertension. He has not been evaluated by a psychiatrist, nor has he been in regular individual outpatient treatment. He does request that his contact with [the PHA superior officer Williams confronted on May 19, 1998] be as limited as possible.

A199.

In August and September 1998, Williams attended three appointments with Dr. Finley, PHA's psychologist. On September 21, 1998, Dr. Finley shared her evaluation of Williams's fitness for duty:

> It is my professional opinion that Sgt. Williams should not resume active duty, involving his usual and normal work activities, unless he is under the proper care of medical and psychological personnel. He requires psychological treatment for depression and stress management. He also requires an evaluation by medical personnel to determine if he may be further helped by psychotropic medications. Sgt. Williams can resume working on alternate work assignments and should do so for a minimum period of 3 months in order to provide an initial opportunity for him to begin receiving benefits from regular medicinal and/or psychological treatment. He should be re-evaluated after this time in order to determine whether or not he can resume active duty with the continuation of prescribed treatment regiment for the management of his stress and depression.
>
> Sgt. Williams [sic] condition appears to be exacerbated by considerable tension between himself and one of his superiors. . . . It could be helpful if the difficulties between them could be mediated or if the amount of contact between the two was greatly reduced.

A200. Upon receipt of the Finley letter, PHA requested clarification of Dr. Finley's findings, to which Dr. Finley responded on October 10, 1998:

> First, I have been called upon by human resources to provide a consultative evaluation for [Sergeant] Edward Williams. I have not nor will I be working with [Sergeant] Williams on an ongoing basis.

> Second, Mr. Williams is fully capable of working, for a temporary period, in either an administrative and/or clerical capacity. He should not carry a weapon, however, for a minimum period of three months. He can work around other officers who will be wearing their weapon. Third, it [is] anticipated that [Sergeant] Williams will be able to fully return to active duty, resuming his usual job responsibilities after this approximate three month period. However, a more definite time frame cannot be provided at this time, pending a reevaluation.

A201.

On October 13, 1998, after Dr. Finley had cleared Williams for restricted duty, Williams requested that PHA temporarily reassign him to work in the PHA training unit. Hughes responded:

> [I]t is the position of this police department that the specific position that you are requesting is not open to you due to your on-going treatment with Dr. Lauren Finley . . . and her recommendation that you should not carry a weapon while still under her care for the next several months. This department has also concluded that once you have completed all of your treatment with Dr. Finley, releasing you to return to full duty, with authorization to carry firearms once again, you are to report back to uniform patrol duty.

A204.

One day later, Williams wrote to Hughes requesting an assignment "in the [PHA] radio room until [his] 3

month evaluation [was] over. . . ." PHA did not respond to that request until this litigation ensued.[1]

On November 19, 1998, Deputy Chief of Police Ricks wrote an internal memorandum to Carl Marinelli, Assistant General Manager for Human Resources, regarding Williams's employment status. Wrote Ricks, "Williams has exhausted all of his leave time and should apply for a medical leave of absence. If he does not apply for a medical leave of absence by November 30, 1998, it is the position of this department that Human Resources terminate Edward Williams according to PHA personnel policy regarding medical leave." A863.

On December 3, 1998, Marinelli wrote to Williams requesting that he file for medical leave.

> As you know, you have exhausted all leave time available as a police Officer with the Philadelphia Housing Authority. It is now necessary that you obtain the required medical evidence and apply for a medical leave of absence. This information and your formal written request should be received by my office no later than December 18, 1998. Failure to do so will result in PHA terminating your employment as of that date.

A206. Williams did not contact Marinelli regarding an application for medical leave and did not respond to the letter.

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[1] The record is unclear as to whether PHA responded to this request, but we assume for summary judgment purposes that PHA did not respond to the radio room request. In the context of this litigation, an affidavit from a PHA Police Department Administrator, John O'Brien, indicated that "[i]nstead of placing Sgt. Williams in the radio room, PHA offered him a leave of absence that would have allowed him to return to work as a police sergeant within 90 days." A202.

On December 29, 1998, Marinelli sent a letter to Williams notifying him that he was being terminated.

> In my letter to you dated December 3, 1998 I asked that you request a medical leave of absence and submit that request along with supporting medical evidence to me no later than December 18, 1998. As you have submitted neither, I am notifying you of your termination from the Philadelphia Housing Authority effective August 28, 1998. Please call . . . to discuss your termination benefits.

A249.

B. Procedural Background

Williams filed a complaint against PHA in the United States District Court for the Eastern District of Pennsylvania asserting several causes of action. After the District Court ruled on PHA's motion to dismiss and motion for judgment on the pleadings, only claims asserting discrimination under the ADA and Pennsylvania Human Relations Act ("PHRA") remained. Ultimately, the District Court granted PHA's motion for summary judgment on those remaining claims. Williams timely moved for reconsideration of that order. The District Court denied that motion, and Williams filed a timely notice of appeal.

II. *Jurisdiction and Standard of Review*

The District Court had federal question jurisdiction under 28 U.S.C. § 1331 with respect to Williams's ADA claims, and supplemental jurisdiction over Williams's PHRA claims under 28 U.S.C. § 1367. This Court has final order jurisdiction under 28 U.S.C. § 1291 to review the District Court's denial of reconsideration, which here

ended the proceedings in that Court. *See Sheehan v. Beyer,* 51 F.3d 1170, 1174 (3d Cir. 1995).

We review the District Court's grant of summary judgment to PHA using the same standard that the District Court applied. *Omnipoint Comm. Enter., L.P. v. Newtown Township,* 219 F.3d 240, 242 (3d Cir. 2000). "Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Carter v. McGrady,* 292 F.3d 152, 157 (3d Cir. 2002).

III. *The Retaliation Claim*

The ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Thus, it is unlawful for an employer to retaliate against an employee based upon the employee's opposition to anything that is unlawful under the ADA." *Shellenberger v. Summit Bancorp, Inc.,* 318 F.3d 183, 188 (3d Cir. 2003).

"[I]n order to establish a *prima facie* case of illegal retaliation under the anti-discrimination statutes, a plaintiff must show: '(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action.'" *Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 567-68 (3d Cir. 2002) (quoting *Krouse v. Am. Sterilizer Co.,* 126 F.3d 494, 500 (3d Cir. 1997)). Williams argues on appeal that PHA terminated him in

retaliation for his request for reassignment to PHA's radio room as a reasonable accommodation.[2]

Applying the *McDonnell Douglas* framework,[3] the District Court assumed *arguendo* that Williams could

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[2] Unlike a claim for discrimination under the ADA, an ADA retaliation claim based upon an employee having requested an accommodation does not require that a plaintiff show that he or she is "disabled" within the meaning of the ADA. "The right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the EEOC, and we have already explained that the ADA protects one who engages in the latter activity without regard to whether the complainant is 'disabled.'" *Shellenberger,* 318 F.3d at 191. Thus, as opposed to showing disability, a plaintiff need only show that she had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested. *See id.*

[3] The burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) applies to ADA retaliation claims. *See Shaner v. Synthes,* 204 F.3d 494, 500 (3d Cir. 2000).

> Briefly summarized, the *McDonnell Douglas* analysis proceeds in three stages. First, the plaintiff must establish a *prima facie* case of discrimination. If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [*McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824.] Finally, should the defendant carry this burden, the plaintiff then must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *See Tex. Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations omitted). While the burden of production may shift, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* Our experience is that most cases turn on the third stage, i.e., can the plaintiff establish pretext.

Id. at 500-01 (quoting *Jones v. School Dist. of Phila.,* 198 F.3d 403, 410 (3d Cir. 1999)) (alterations in original).

make out a *prima facie* showing of retaliation. The Court then noted that PHA had put forth a legitimate reason for terminating Williams: Williams had exhausted all available leave time to which he was entitled and failed to request a leave of absence or otherwise contact PHA in response to Carl Marinelli's December 3, 1998, letter. Upon shifting the burden back to the plaintiff, the District Court found that he presented "very little in the way of evidence showing 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action.'" Dist. Court Op. at 18 (quoting *Fuentes v. Perskie,* 32 F.3d 759, 765 (3d Cir. 1994)). In addition, the Court held that the timing of Williams's termination on December 29, 1998, occurring over two months after the request for an accommodation on October 21, 1998, was not suggestive of a causal connection between Williams's request for an accommodation and termination. The Court concluded that the summary judgment record would not support a finding that PHA's explanation for the termination was pretextual. We agree.

In support of his retaliation claim, Williams relies primarily on the temporal proximity between his October 21, 1998, request for an accommodation and his December 29, 1998, termination. We have held in the ADA retaliation context that "temporal proximity between the protected activity and the termination [can be itself] sufficient to establish a causal link." *Shellenberger,* 318 F.3d at 183 (quoting *Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 (3d Cir.1997)) (internal quotation marks omitted). However, "the timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred." *Shellenberger,* 318

F.3d at 189 n. 9 (quoting *Krouse,* 126 F.3d at 503) (internal quotation marks omitted). For example, two days between the protected activity engaged in and the alleged retaliation sufficed in *Jalil v. Avdel Corp.,* 873 F.2d 701, 708 (3d Cir.1989), to support an inference of a causal connection between the two. Similarly, in *Shellenberger,* comments made by a supervisor suggesting retaliation ten days before termination, along with other evidence of retaliation, were sufficient to establish a *prima facie* showing of causation. *Shellenberger,* 318 F.3d at 189.

Here, over two months elapsed between the time Williams requested a radio room assignment and the time that he was terminated. In cases like this one, "where 'the temporal proximity is not so close as to be unduly suggestive,' we have recognized that 'timing plus other evidence may be an appropriate test. . . .'" *Thomas v. Town of Hammonton,* 351 F.3d 108, 114 (3d Cir.2003) (quoting *Estate of Smith v. Marasco,* 318 F.3d 497, 513 (3d Cir. 2003) (internal quotation marks omitted)).[4] Williams has, however, put forth no other evidence suggesting that PHA terminated him *because* he requested a radio room assignment. Moreover, the evidence

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[4] Williams argues that the retaliatory action in this case occurred not on the date that he was terminated, but on November 19, 1998 – the day an internal PHA memo directed Marinelli to write to Williams and demand that he apply for medical leave or be terminated. The memo indicated that "it is the position of this department that Human Resources terminate Edward Williams according to PHA personnel policy regarding medical leave" if Williams "does not apply for a medical leave of absence by November 30, 1998." A510. Even assuming *arguendo* that November 19, 1998, were the date of retaliatory action in this case, our classification of this case as one "where the temporal proximity is not so close as to be unduly suggestive" would remain the same.

supporting PHA's alternative explanation is quite compelling. As Williams acknowledges, PHA had granted Williams medical leave on two prior occasions, and there was no indication that PHA would not have done so again had Williams simply contacted Marinelli, as the letter requested.[5] Nor is there any dispute that, absent an application and supporting medical certification, termination was the only option available to PHA under the relevant, consistently applied policy.

Because Williams has failed to proffer any evidence of retaliation other than the not unduly suggestive temporal relationship between his request for an accommodation and his termination, we must agree with the District Court that "no reasonable jury could conclude that the two events shared a causal link" for purposes of an ADA retaliation claim. Dist. Court Op. at 22.

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[5] Williams hypothetically suggests in his brief that, although he was aware of PHA's general policy on leaves of absences and PHA's ability to grant a leave of absence for any reason, "perhaps" Marinelli's request in the December 3, 1998, letter to obtain the "required medical evidence" led him to believe that a leave of absence would now only be available to him upon providing that evidence. He then argues in his brief that, if he held such a belief, he would have also thought that it would be impossible to obtain such evidence because he was capable of working and PHA's own expert had cleared him for restricted work.

There is, however, no record support for such an argument. "[W]e have repeatedly held that unsubstantiated arguments made in briefs or at oral argument are not evidence to be considered by this Court." *Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1370 (3d Cir. 1993). Williams has not cited to any record evidence indicating that he held such a belief.

IV. *The Discrimination Claim*

Section 12112(a) of Title 42, United States Code, provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id.[6] A "qualified individual with a disability" is defined by the ADA as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

To establish a *prima facie* case of discrimination under the ADA, a plaintiff must therefore show "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Taylor,* 184 F.3d at 306 (quoting *Gaul v. Lucent Technologies,* 134 F.3d 576, 580 (3d Cir.1998) (citing

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[6] Williams has also brought his disability discrimination claim under the Pennsylvania Human Relations Act ("PHRA"). An "analysis of an ADA claim applies equally to a PHRA claim." *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 306 (3d Cir. 1999) (citing *Kelly v. Drexel Univ.,* 94 F.3d 102, 105 (3d Cir. 1996)). Accordingly, we will only discuss Williams's ADA claim because our analysis of that claim is, under the circumstances of this case, coterminous with the PHRA claim.

Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir.1996))) (internal quotation marks omitted).

Adverse employment decisions in this context include refusing to make reasonable accommodations for a plaintiff's disabilities. The ADA specifically provides that an employer "discriminates" against a qualified individual with a disability when the employer does "'not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer].'" *Taylor,* 184 F.3d at 306 (quoting 42 U.S.C. § 12112(b)(5)(A)) (alterations in original). "Reasonable accommodation" further "includes the employer's reasonable efforts to assist the employee and to communicate with the employee in good faith," *Mengine v. Runyon,* 114 F.3d 415, 416 (3d Cir. 1997), under what has been termed a duty to engage in the "interactive process," which we will discuss in detail *infra.*

Williams alleges that PHA discriminated against him by (1) failing to provide for the reasonable accommodations that he requested and (2) breaching its duty to engage in the interactive process by not responding in good faith to his requests for accommodations. The District Court held, *inter alia,* that Williams was not "disabled" within the meaning of the ADA and therefore could not make a *prima facie* showing of disability discrimination. We now review *de novo* whether Williams made such a showing.

A. Disability

A "disability" is defined by the ADA as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Williams asserts that he met the criteria for disability under § 12102(2)(A) ("actual disability") because he had "a physical or mental impairment that substantially limits one or more of the major life activities," in that his mental condition prevented him from carrying firearms. Williams further asserts that he met the criteria for disability under § 12102(2)(C) ("regarded as disabled") because his employer, PHA, wrongly perceived him to be disabled when it treated him as unable to work with, have access to, or be around others carrying, firearms.

i. Actual Disability

With respect to determining whether an individual is actually disabled within the meaning of the ADA, EEOC Regulations[7] provide that an individual is "substantially

[7] "Because the ADA does not define many of the pertinent terms, we are guided by the Regulations issued by the Equal Employment Opportunity Commission ('EEOC') to implement Title I of the Act. *See* 42 U.S.C. § 12116 (requiring the EEOC to implement said Regulations); 29 C.F.R. § 1630.2." *Deane v. Pocono Medical Center,* 142 F.3d 138, 143 n.4 (3d Cir. 1998) (*en banc*) (citations omitted). While there is some question as to the level of deference EEOC regulations interpreting definitional terms of the ADA are entitled to after the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), neither of the parties challenges the reasonableness of the EEOC's regulations with respect to the term "disability." *See Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 194 (2002) ("[N]o agency has been given

(Continued on following page)

limited" in performing a major life activity if the individual is

> (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Several factors are to be considered in evaluating whether an individual is substantially limited in a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2).

Williams contends that his inability to carry a firearm substantially limited him in the major life activity of "working." The EEOC regulations provide that, in determining whether an individual is restricted in the major life activity of working,

> [t]he term 'substantially limits' means significantly restricted in the ability to perform either

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authority to issue regulations interpreting the term 'disability' in the ADA. Nonetheless, the EEOC has done so. *See* 29 CFR §§ 1630.2(g)-(j) (2001). Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due.") (citing *Sutton*, 527 U.S. at 479-80).

> a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. § 1630.2(j)(3)(i). Several specific additional factors are to be considered in determining whether an individual is substantially limited in the major life activity of working:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3)(ii).

Summarizing these regulations, the Supreme Court has held that

> [t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing

> an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 493. The question of whether an individual is substantially limited in a major life activity is a question of fact. *See Gagliardo v. Connaught Labs., Inc.,* 311 F.3d 565, 569 (3d Cir. 2002).

The District Court, viewing Williams's actual limitation (*i.e.,* his inability to carry a firearm resulting from his severe depression) as one that "temporarily limit[ed] the jobs that were available to [him] to those jobs that do not require him to carry a firearm," Dist. Court Op. at 29, held that Williams was not precluded from performing a broad range of jobs, and therefore was not disabled within the meaning of the ADA. The District Court noted that Williams had testified at a deposition that he could have performed the duties of a bus driver, chauffeur, and tow truck operator, and could have worked for the public transportation agency SEPTA, a rental car agency, or in the radio room at PHA, thereby not precluding him from performing work in a broad range of jobs.

We agree with the District Court that Williams's testimony establishes that he was not precluded from a "broad range of jobs" within the meaning of 29 C.F.R. § 1630.2(j)(3)(ii)(C). However, the regulations provide that one is substantially limited in the major life activity of working if one is significantly restricted in one's ability to perform "*either* a class of jobs *or* a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added). It is clear from the regulations that, even if one has the ability to

perform a broad range of jobs, one is nevertheless disabled if one is significantly restricted in one's ability to perform most of the jobs in one's geographical area that utilize training, knowledge, skills and abilities similar to the job one has been disqualified from performing. The EEOC's Technical Assistance Manual, for example, refers to the following scenario as an example of being significantly restricted in one's ability to perform a "class of jobs:"

> A computer programmer develops a vision impairment that does not substantially limit her ability to see, but because of poor contrast is unable to distinguish print on computer screens. Her impairment prevents her from working as a computer operator, programmer, instructor, or systems analyst. She is substantially limited in working, because her impairment prevents her from working in the class of jobs requiring use of a computer.

Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* II-7 (Jan. 1992) ("*Technical Assistance Manual*").

The District Court did not address whether Williams was significantly restricted in his ability to perform a *class* of jobs because of his depression and the resulting inability to carry a firearm. A critical question was thus left unanswered: Compared to an average person living in the same geographical region as Williams with similar training, knowledge, skills, and abilities, was Williams substantially restricted in his ability to perform jobs in law enforcement? We conclude that the record would permit a reasonable jury to conclude that he was.

Williams contends that his inability to carry a firearm precludes him from serving in most law enforcement jobs wherever located and therefore significantly restricts his ability to perform that class of jobs. While the record has not been fully developed on this issue, it does support that contention. PHA administrator John O'Brien testified in an affidavit that "[a]s of 1998, the only job assignment available in the PHA police department that did not require the use of a firearm was work in the PHA radio room." A202. Moreover, PHA has not challenged, for summary judgment purposes, that Williams was incapable of working in most law enforcement positions due to his inability to carry a gun. Instead, PHA argues that (1) "law enforcement" cannot constitute a "class" of jobs, and (2) Williams's inability to work with firearms was, in fact, temporary and, accordingly, not a "significant restriction."

PHA does not explain why law enforcement positions are not a "class of jobs" within the meaning of that phrase as used in the EEOC's regulations, and our reading of those regulations persuades us that the record would support a finding in favor of Williams on this issue. For example, assuming the jury were convinced that Williams's condition substantially restricts his ability to perform law enforcement jobs, it seems to us that Williams would be no less limited in the major life activity of working than the computer programmer referenced by the EEOC as being "substantially limited in working, because her impairment prevents her from working in the class of jobs requiring use of a computer." *Technical Assistance Manual* at II-7.

We reject the PHA's suggestion that *Sutton* teaches to the contrary. In *Sutton,* a group of myopic job applicants

challenged an airline's minimum vision requirement for the job of "global airline pilot." The Supreme Court noted that this position, global airline pilot, was a "single job" (and, in fact, was a position with one single employer), and did not preclude the group from pursuing "a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor to name a few, [that] are available to them." *Sutton,* 527 U.S. at 493. The Court noted that under the Interpretative Guidance provided by the EEOC, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." *Id.*

In *Sutton,* petitioners could not be one type of pilot working for one particular employer, but could hold various other pilot jobs. Williams, on the other hand, could not work in most law enforcement positions so long as his condition persisted.

With respect to the expected duration of Williams's impairment, the record is not fully developed, but we conclude that there is enough evidence to permit resolution of the issue in Williams's favor. As a matter of law, a "transient, nonpermanent condition," *McDonald v. Commonwealth,* 62 F.3d 92, 94-97 (3d Cir. 1995), or "a temporary, non-chronic impairment of short duration," *Rinehimer v. Cemcolift, Inc.,* 292 F.3d 375, 380 (3d Cir. 2002), it is true, fall short of substantially limiting an individual in a major life activity. Accordingly, the EEOC has suggested, for example, that broken limbs, sprained joints, concussions, appendicitis, and influenza, being impairments of a temporary nature "with little or no long term or permanent impact," cannot as a matter of law

substantially limit an individual in a major life activity. *See* EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(j). However, Williams does not need to show that his disability is permanent; instead, under the EEOC regulations, the "nature and severity" of Williams's impairment and its "duration or expected duration," along with the "permanent or long term impact" of that impairment, are factors to be considered in determining whether an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j)(2). Because an impairment and its impact may be less than permanent and still "significantly restrict" a person's ability to perform a class of jobs, the current record precludes summary judgment based on this issue.

Williams's medical record reflects that he was professionally diagnosed with "Major Depressive Disorder" as early as December of 1996, and that he was under continuing treatment for depression in the fall of 1999, more than a year after his termination. Examining clinicians on both sides agreed that, during the time in which Williams first took leave from PHA in the summer of 1998, Williams suffered from depression that required treatment over at least an indefinite period of time. Dr. Finley, PHA's psychologist, concluded that Williams "require[d] psychological treatment for depression and stress management," A200, and indicated that his condition was severe enough to prevent him from carrying a firearm. Dr. Finley did not express an opinion as to the duration of Williams's impairment, but suggested that he might be "further helped by psychotropic medications," although further evaluation would be necessary to determine whether or not he could "resume active duty with the continuation of prescribed treatment." A200. Reevaluation

after a period of three months would be required to provide a "more definite time frame" for his full return to active duty. A201. Helen Huffington, M.S.S., Williams's treating counselor at Delaware County Psychological Services, indicated that Williams suffered from "major depression," and further concluded that his condition was "recurrent [and] severe," A198, thereby suggesting that Williams's mental impairment was severe, would have a long-term impact, and was likely to persist. Williams's personal psychologist, Dr. Levitt, reached the same conclusion as Huffington, diagnosing Williams as suffering from recurrent and severe major depression. A519.

While Dr. Finley hoped that treatment would improve Williams's condition in the future, there was certainly no assurance that such would be the case.[8] Moreover, given in this case the history of the disorder, the lack of such assurance, and the conclusions of Williams's treating clinicians that his major depression was

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[8] As we have noted, Dr. Finley wrote, in part, as follows:

> It is my professional opinion that Sgt. Williams should not resume active duty, involving his usual and normal work activities, unless he is under the proper care of medical and psychological personnel. He requires psychological treatment for depression and stress management. He also requires an evaluation by medical personnel to determine if he may be further helped by psychotropic medications. Sgt. Williams can resume working on alternate work assignments and should do so for a *minimum* period of 3 months in order to provide an initial opportunity for him to begin receiving benefits from *regular* medicinal and/or psychological treatment. He should be *reevaluated after this time in order to determine whether or not he can resume active duty with the continuation of prescribed treatment* regiment for the management of his stress and depression.

A200 (emphasis added).

severe and recurrent, a reasonable jury could conclude that Williams's problem was not a temporary one, and would not be precluded from reaching a finding of actual disability.

ii. "Regarded As" Disabled

While Dr. Finley, PHA's examining clinician, indicated that Williams was only limited in his ability to *carry* a firearm, the record is clear that PHA perceived Williams as being unable to have *access* to firearms and to be *around others* carrying firearms. As PHA Administrator O'Brien has testified,

> [a]t all relevant times, PHA assigned *armed police officers* to work in the PHA radio room. Anyone assigned to the radio room would have *access* to firearms. . . . PHA did not assign Sergeant Williams to he radio room . . . because . . . Sgt. Williams would have *access* to firearms in the radio room.

A202 (emphasis added). Williams argues that PHA wrongly perceived him as having these additional limitations, and thereby regarded him as being disabled.[9]

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[9] In light of Dr. Finley's conclusion that Williams could be around others carrying firearms, there is, of course, a factual issue to be determined as to whether PHA's perception was accurate and reflected Williams's actual disability, which we will discuss *infra* with respect to whether Williams could have been accommodated. If PHA's perception was, in fact, accurate, a jury could still determine that Williams was disabled, but these additional limitations (*i.e.*, that he not have access to firearms or be around others carrying firearms) might prevent him from being a qualified individual, in that there may have been no way to accommodate such an individual at this employer police station.

"A person is 'regarded as' having a disability" if the person:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.

Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 188 (3d Cir. 1999) (quoting 29 C.F.R. § 1630.2(1)). Here, Williams argues that PHA regarded him as having a limitation (*i.e.*, the inability to have access to or be around others carrying firearms) far greater than the actual limitation (*i.e.*, the inability to carry a firearm) that resulted from his mental impairment.[10]

We determined previously that a trier of fact could find Williams to be actually disabled based on the evidence suggesting that Williams's inability to carry a firearm significantly restricted his ability to perform law enforcement jobs. The additional limitations perceived by PHA, of course, only serve to further restrict the jobs

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[10] Williams's position, that he was both actually disabled and wrongly regarded as disabled, is "[not] intrinsically contradictory, as he could have an impairment (whether or not it rose to the level of a disability) that could actually be accommodated, despite [his employer's] perception that his disability was too severe to accommodate." *Pathmark*, 177 F.3d at 189.

Williams could perform in law enforcement. As Williams suggests, an inability to have access to or be around others carrying firearms would prevent him from serving in virtually all law enforcement positions. Williams has therefore sufficiently demonstrated that a trier of fact could determine that PHA regarded him as being substantially limited in the major life activity of working because of its perception that he could not hold any law enforcement position.

PHA argues, however, that Williams's "regarded as" disability claim must fail because it regarded him as temporarily disabled for "90 days," even if his actual limitation was not temporary. In support of that proposition, PHA first suggests that Dr. Finley's reports would require a jury to conclude that PHA regarded Williams as disabled only for 90 days. While PHA heavily relies upon Dr. Finley's reports as the basis for its view of Williams's impairments, Dr. Finley's reports, as we have noted, indicate that it was not possible to provide "a more definite time frame . . . at this time [as to when Williams could carry a firearm], pending a reevaluation." A201. A reasonable juror could find that Dr. Finley's reports, as relied upon by PHA, establish that PHA viewed Williams as requiring ongoing treatment, and that PHA did not believe that a return to full duty was imminent.

PHA further looks to a memo from Assistant Chief of Operations Aaron Hughes to Williams dated October 20, 1998, in which Hughes indicated that "once you [Williams] have completed all of your treatment with Dr. Finley, releasing you to return to full duty, with authorization to carry firearms once again, you are to report back to uniform patrol duty." A204 (the "Hughes memorandum"). The Hughes memorandum required Williams

to complete "all" of his treatment with Dr. Finley and receive her authorization to carry firearms before being allowed to return to "patrol duty." That memorandum was written ten days after Dr. Finley informed PHA that she had *not* been asked to treat Williams and would *not* "be working with [Sergeant] Williams on an ongoing basis." A160. Given that PHA had been informed by Dr. Finley that no such treatment with her was planned, it is difficult to see how a reasonable juror, reading the Hughes memorandum and its requirement that Williams receive treatment from Dr. Finley, would have to conclude that PHA was determined to allow Williams to return to work in 90 days. Moreover, in light of the memorandum's requirement that Williams receive medical clearance to carry firearms before returning to PHA, a reasonable juror could determine that PHA perceived Williams's impairment to be of an unknown and potentially unlimited determination.[11]

We thus conclude that there is a material dispute of fact both as to whether Williams was actually disabled in the summer of 1998 and as to whether he was regarded by PHA as being disabled.

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[11] PHA further relies upon an affidavit submitted by PHA Administrator O'Brien indicating that PHA offered Williams a "leave of absence that would have allowed him to return to work as a police sergeant within 90 days." A202. This would apparently be the basis for PHA's argument that they perceived Williams as able to return to work in 90 days. However, the affidavit conflicts on its face with the Hughes memorandum, which indicated that Williams would only be allowed to return to work upon completion of treatment with the employer's psychologist-treatment that the employer's psychologist never agreed to perform-and upon receiving clearance from the employer's psychologist to carry firearms. While a jury might believe O'Brien's testimony, the record certainly does not compel such a conclusion.

B. Qualified Status

The second element of Williams's *prima facie* case of discrimination under the ADA requires him to show that he is a "qualified individual." *See Deane,* 142 F.3d at 145. As previously noted, a qualified individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). "[A] disabled employee may establish a *prima facie* case under the ADA if s/he shows that s/he can perform the essential functions of the job with reasonable accommodation and that the employer refused to make such an accommodation." *Skerski v. Time Warner Cable Co.,* 257 F.3d 273, 284 (3d Cir. 2001).

Under the ADA, a "reasonable accommodation" includes "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). However, the EEOC's commentary to its regulations provides that reassignment "should be considered only when accommodation within the individual's current position would pose an undue hardship." EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o). Neither party has suggested that any accommodation within Williams's current position would have been possible in this case.

Williams first asked to be reassigned to PHA's training unit. PHA responded to Williams: "the specific position that you are requesting is not open to you due to your on-going treatment with Dr. Lauren Finley . . . and her recommendation that you should not carry a weapon while still under her care for the next several months." A204. Williams then responded by requesting a

radio room assignment. PHA did not directly respond to this request until litigation.

It is Williams's position that with the benefit of an accommodation transfer he would have been able to perform the essential functions of a member of the radio room or the training unit. With respect to the radio room, both sides agree that, absent his inability to carry a firearm, Williams was qualified for that position. Indeed, PHA assigned him to that position prior to receiving Dr. Finley's report and concluding that he could not be around others carrying, or have access to, firearms. Assuming a reasonable jury concludes that Williams's actual limitation consisted of an inability to carry firearms, there is nothing in the record to suggest that Williams could not function in the radio room without carrying a firearm. In any event, PHA has not challenged, for summary judgment purposes, that Williams could have worked in the radio room without *carrying* a firearm, and that vacant, funded radio room positions were available.

PHA insists, however, that Williams was not qualified to work in the radio room because he was not only unable to carry a firearm, but was, in fact, also unable to have access to firearms or be around others who carried firearms. Concededly, a radio room assignment would have allowed Williams to have access to firearms or to be around others who carried firearms. This argument cannot succeed at the summary judgment stage, however, because PHA's own doctor's report supports the view that Williams's condition did not preclude him from working with people who carried weapons. Dr. Finley specifically concluded that Williams "can work around other officers who will be wearing their weapon." A201.

A reasonable jury could thus conclude that Williams's actual limitations left him qualified to do radio room work.[12]

To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a plaintiff in Williams's position must show that there were vacant, funded positions whose essential functions the employee was capable of performing *in the eyes of the employer who misperceived the employee's limitations.*[13] Even if a trier of fact concludes that PHA *wrongly* perceived Williams's limitations to be so severe as to prevent him from performing *any* law enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was capable of performing in light of its misperception. Williams could not have been a "qualified individual" under the ADA, PHA suggests, because there were *no* jobs at this employer police station he could have performed given its misperception that he could not be around others carrying, or have access to, firearms. We reject this suggestion.

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[12] Given PHA's denial of Williams's request for a transfer to the training unit based solely on Dr. Finley's report, a reasonable jury could also conclude that, absent the inability to carry a weapon, Williams was otherwise qualified to serve in the training unit. Based on the extent of Williams's service with the PHA, we believe a reasonable jury could infer that his service in the training unit would not necessarily require carrying a firearm.

[13] We assume for present purposes that a jury determines that Williams's actual limitation was an inability to carry firearms, and that PHA misperceived Williams's limitations when it concluded that he was unable to have access to, or be around others carrying, firearms.

"[O]ne of the points of 'regarded as' protection is that employers cannot misinterpret information about an employee's limitations to conclude that the employee is incapable of performing a wide range [or class] of jobs." *Pathmark,* 177 F.3d at 190. PHA's argument, if accepted, would make "regarded as" protection meaningless. An employer could simply regard an employee as incapable of performing *any* work, and an employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory, because the employee would never be able to demonstrate the existence of any vacant, funded positions he or she was capable of performing in the eyes of the employer.

Pathmark soundly rejects an argument similar to that here made by PHA. There, an employer received a medical report indicating that an employee would have a significant "*temporary*" impairment, and the employer misperceived the report, indicating to the employee that it had "been advised your restrictions are *permanent,*" *id.* at 184 (emphasis added). Viewing the employee as suffering from severe, permanent limitations as a result of what was in fact a temporary impairment, the employer supermarket concluded that the worker "was unable to perform *any* Pathmark job, even with accommodation," *id.* at 188, and fired the worker.

We agreed with the employee "that, in general, an employer's perception that an employee cannot perform a wide range [or class] of jobs suffices to make out a 'regarded as' claim." *Id.* at 188. We held that, with respect to the employee's "regarded as" claim, the employer would be "liable if it wrongly regarded [the employee] as so disabled that he could not work and therefore denied him a job." *Id.* at 190. Anticipating

PHA's challenge here, we held that "[i]f an employer believes that a perceived disability inherently precludes successful performance of the essential functions of a job, with or without accommodation, the employer must be correct about the affected employee's ability to perform the job in order to avoid liability." *Id.* at 193.[14] Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the

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[14] We also noted that "the law in this circuit is that a 'regarded as' plaintiff can make out a case [even] if the employer is innocently wrong about the extent of his or her impairment," *id.* at 191, meaning that there is no general "good faith" defense available to PHA to the extent it misperceived Williams as having an impairment that substantially limits a major life activity based upon myths, fears, or stereotypes associated with disabilities.

There is, however, a limited defense available to employers who engage in an "individualized determination of the employee's actual condition" and develop a misperception "based on the employee's unreasonable actions or omissions." *Id.* at 193. Assuming a jury determines that PHA misperceived Williams as being unable to have access to, or be around others carrying, firearms, the existence of such a defense in this case would also be a question for a jury, given that PHA retained such a misperception despite clarification from Dr. Finley that Williams could be around others carrying firearms and a communication from Williams requesting a radio room assignment in light of his having been cleared for such an assignment by Dr. Finley.

Of course, while "an employer's innocent mistake (which may be a function of 'goofs' or miscommunications) is sufficient to subject it to liability under the ADA," the "employer's state of mind [remains] relevant to the appropriate remedies." *Id.* at 182-83 (citation omitted); *see* 42 U.S.C.1981a(a)(3) (where "discriminatory practice involves the provision of a reasonable accommodation," "damages may not be awarded . . . where the covered entity demonstrates good faith efforts, in consultation with [employee], to identify and make a reasonable accommodation"); *see also Deane,* 142 F.3d at 148 n.12 ("regarded as" plaintiff "might be entitled to injunctive relief against future discrimination").

availability of a position he or she was capable of performing in the eyes of the misperceiving employer.

To meet his litigation burden with respect to both his "actual" and "regarded as" disability claims, Williams need only show

> (1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with reasonable accommodation. If the employee meets his burden, the employer must demonstrate that transferring the employee would cause unreasonable hardship.

Donahue v. Consol. Rail Corp., 224 F.3d 226, 230 (3d Cir. 2000). Williams alleges, and the record supports a finding, that a radio room assignment was available, that the position was at or below his level, and that he was qualified to perform the essential duties of that job with no further accommodation. Thus, Williams has established that there is a material dispute of fact as to whether he was a qualified individual under the ADA.[15]

[15] We are, of course, aware that "an employer is not required to provide a reasonable accommodation if it . . . would pose a 'direct threat' to the safety of the employee or others, 29 C.F.R. § 1630.15(b)(2), *see Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, [78-79], 122 S.Ct. 2045, 2049, 153 L.Ed.2d 82 (2002)." *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002); *see also* 29 C.F.R. § 1630.2(r) (defining "direct threat"). PHA has not argued, for summary judgment purposes, that Williams was not entitled to reasonable accommodation under the "direct threat" exemption, and has instead focused its efforts on whether Williams was disabled and/or a qualified individual.

Having concluded that there is a material dispute of fact as to whether Williams was disabled and a qualified individual, we mention the "direct threat" exemption here only to make clear that the ADA is

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C. Adverse Employment Action Resulting From Discrimination

As we have noted, a failure to make a reasonable accommodation for a disabled and qualified employee constitutes discrimination under the ADA. *Taylor,* 184 F.3d at 306. Williams claims that PHA failed to make such an accommodation when it refused his requests for assignment to the radio room and the training unit. In addition to insisting that Williams was not disabled, PHA seems to suggest that it offered to reasonably accommodate Williams by offering him an unpaid leave of absence and future employment should he recover. "[T]he question of whether a proposed accommodation is reasonable is a question of fact." *Buskirk,* 307 F.3d at 170; *see also Skerski,* 257 F.3d at 286; *cf. Walton v. Mental Health Ass'n of Southeastern Pa.,* 168 F.3d 661, 671 (3d Cir. 1999) ("unpaid leave supplementing regular sick and personal days might, under [some] facts, represent a reasonable accommodation"). If a trier of fact concludes that Williams was disabled, however, it could also find that the failure to continue Williams' paid employment as a member of the radio or training unit was a failure to reasonably accommodate and accordingly constituted an adverse employment action under the ADA.

Additionally, we have repeatedly held that an employer has a duty under the ADA to engage in an "interactive process" of communication with an employee

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not unsympathetic to employers faced with an employee who truly poses a "direct threat" to workplace safety. Here, of course, there is a triable issue of fact as to whether Williams posed such a "direct threat," given that PHA's refusal to allow Williams to work around others with firearms was contrary to the conclusion of its own clinician.

requesting an accommodation so that the employer will be able to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate. "The ADA itself does not refer to the interactive process," but does require employers to "make reasonable accommodations" under some circumstances for qualified individuals. *Shapiro v. Township of Lakewood,* 292 F.3d 356, 359 (3d Cir. 2002) (internal quotation marks and alterations omitted). With respect to what consists of a "reasonable accommodation," EEOC regulations indicate that,

> [t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(*o*)(3). Further,

> The EEOC's interpretive guidelines establish the circumstances that trigger the employer's duty to engage in this interactive process: "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."

Jones v. United Parcel Serv., 214 F.3d 402, 407 (3d Cir. 2000) (quoting 29 C.F.R. Pt. 1630, App. § 1630.9).

Accordingly, we have held that both employer and employee "have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." *Mengine*, 114 F.3d at 420 (discussing the duty in the context of the Rehabilitation Act). An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process by showing that:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.

Taylor, 184 F.3d at 319-20. However, in addressing an employee's claim that an employer failed to engage in the interactive process, we have also made clear that a "plaintiff in a disability discrimination case who claims that the defendant engaged in discrimination by failing to make a reasonable accommodation cannot recover without showing that a reasonable accommodation was possible." *Donahue*, 224 F.3d at 234. Thus, "'because employers have a duty to help the disabled employee devise accommodations, an employer who acts in bad faith in the interactive process will be liable *if the jury can reasonably conclude that the employee would have been able to perform the job with accommodations*.'" *Id.* at

234-35 (quoting *Taylor,* 184 F.3d at 317) (emphasis in original).

Under *Taylor,* Williams has demonstrated that a fact-finder could conclude that PHA knew about his disability, that he requested accommodation, that PHA's quite limited response to his training unit assignment request was not made in good faith, that PHA's offer of extended unpaid leave was not a good faith response to his request for a radio room assignment, and that Williams could have been reasonably accommodated with a radio room or training unit assignment but for PHA's lack of good faith. Thus, a material dispute of fact exists as to whether PHA failed to engage in good faith in the interactive process, thereby failing to reasonably accommodate Williams.[16]

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[16] Our admonition *en banc* in *Deane* that employers take seriously the interactive process rings true in this case. There, we noted that a single phone call between an employer and an employee "hardly satisfies our standard that the employer make reasonable efforts to assist the employee, to communicate with him in good faith, and to not impede his investigation for employment." *Deane,* 142 F.3d at 149. PHA's initial response to Williams's request for a training unit assignment did little to meet its obligation to interact in good faith. *Compare* A204 ("it is the position of this police department that the specific position that you are requesting is not open to you due to your on-going treatment with Dr. Lauren Finley . . . and her recommendation that you should not carry a weapon while still under her care for the next several months.") *with Taylor,* 184 F.3d at 317 ("Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee's request, and offer and discuss available alternatives when the request is too burdensome").

PHA's subsequent failure to respond to Williams's request for a radio room assignment further subjected it to the risk that it overlooked an opportunity to accommodate a statutorily disabled employee. *See*

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V. *"Regarded As" Employees and the Right to Reasonable Accommodation*

To the extent Williams relies upon a claim that PHA perceived his impairment to be greater than it was, PHA advances an additional argument. It insists that a "regarded as" disabled employee is not entitled to accommodation under the ADA and that, accordingly, Williams suffered no adverse employment action other than his termination.[17] This presents an issue that is one of first impression in this Circuit and has occasioned a circuit split elsewhere. We assume for purposes of our analysis that the trier of fact will find erroneous PHA's perception that Williams's depression prevented him from being around others carrying, or having access to, guns.

Based on the statutory text and the legislative history of the ADA, the First Circuit Court of Appeals has held that a "regarded as" disabled employee is entitled to be accommodated. *Katz v. City Metal Co.,* 87 F.3d 26, 33 (1st Cir. 1996). The better-reasoned district court decisions reach the same result. *See Jacques v. DiMarzio,*

Taylor, 184 F.3d at 317 ("[A]n employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA.").

[17] Even if we were to agree with PHA that "regarded as" disabled individuals are not entitled to reasonable accommodations under the ADA, we note that we would nonetheless be required to remand this matter for further proceedings based upon the existence of a material dispute of fact with respect to Williams's actual disability. If a jury finds Williams to have been actually disabled because his depression deprived him of the ability to carry a firearm, as we discuss *supra* note 14, liability could be imposed even though PHA denied his requests for accommodation based on its misperception regarding the extent of Williams's impairment.

Inc., 200 F. Supp. 2d 151, 163-71 (E.D.N.Y. 2002); *Jewell v. Reid's Confectionary Co.*, 172 F. Supp.2d 212, 218-19 (D. Me. 2001); *see also Lorinz v. Turner Const. Co.*, 2004 WL 1196699, *8 n.7 (E.D.N.Y. May 25, 2004) (endorsing *Jacques*); *Miller v. Heritage Prod., Inc.*, 2004 WL 1087370, *10 (S.D. Ind. Apr. 21, 2004) (same). We also find Judge Block's analysis in *Jacques* particularly persuasive, and will largely track his approach below.

As PHA stresses, however, there are two Courts of Appeals who have reasoned to a contrary conclusion, *see Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999), and two have so concluded without analysis, *see Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. East Texas State University*, 161 F.3d 276, 280 (5th Cir. 1998).[18] We find ourselves unpersuaded by the reasoning of *Weber* and *Kaplan*.

Weber acknowledged that the statutory text did not distinguish between actually and "regarded as" disabled employees. It declined to apply the statute as written, however, because doing so, in its view, "would lead to bizarre results." 186 F.3d at 916. In so concluding, it declined to attribute to Congress an intent "to create a disparity among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of the employers' misperceptions, a right to reasonable accommodations. . . . " *Id.* at

[18] Three Circuit Courts, including our own, have thus far considered but declined to address the issue. *See Cameron v. Cmty. Aid For Retarded Children, Inc.*, 335 F.3d 60, 64 (2d Cir. 2003); *Mack v. Great Dane Trailers*, 308 F.3d 776, 783 n.2 (7th Cir. 2002); *Buskirk*, 307 F.3d at 168-69 & n.2.

917. In *Kaplan,* the Court of Appeals for the Ninth Circuit, despite finding that "on its face, the ADA's definition of 'qualified individual with a disability' does not differentiate between the three alternative prongs of the 'disability definition,'" 323 F.3d at 1232, adopted the rationale of *Weber,* again suggesting that a "formalistic reading" of the ADA would lead to "bizarre results." *Id.* Specifically, *Kaplan* endorsed the "windfall theory" suggested in a dictum by our Court: "it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation." *Pathmark,* 177 F.3d at 196 (citing *Deane,* 142 F.3d at 149 n.12).

While we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a "regarded as" disabled employee would produce "bizarre results," we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text. Here, and in what seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results. Accordingly, we will remain faithful to its directive in this case.

A. The Plain Language of the ADA

As we have heretofore explained, the ADA makes it unlawful for a covered employer to "discriminate against a qualified individual with a disability because of the disability," 42 U.S.C. § 12112(a), and "discrimination" in this context includes, with an exception not here relevant, "not making reasonable accommodation to the . . .

mental limitations of an otherwise qualified individual with a disability," 42 U.S.C. § 12112(b)(5)(A). The definition of "disability" includes "*being regarded as having . . . an impairment*" that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C) (emphasis added). Thus, as all would agree, the statutory text of the ADA does not in any way "distinguish between [actually] disabled and 'regarded as' individuals in requiring accommodation." *Pathmark,* 177 F.3d at 196.

B. The Legislative History

Moreover, the legislative history of the ADA confirms that Congress meant what its text says. As Congress explained:

> [The objective of the "regarded as" provision of the ADA] was articulated by the Supreme Court in *School Board of Nassau County v. Arline.* The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."
>
> The Court concluded that, by including this test, "Congress acknowledged accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."
>
> Thus, a person who [suffers an adverse employment action] because of the myths, fears

> and stereotypes associated with disabilities would be covered under [the "regarded as" prong], whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.

H.R. Rep. No. 101-485 (III), 1990 U.S.C.C.A.N. 445, 453 (footnotes omitted). Thus, the ADA was written to protect one who is "disabled" by virtue of being "regarded as" disabled in the same way as one who is "disabled" by virtue of being "actually disabled," because being perceived as disabled "may prove just as disabling." This case demonstrates the wisdom of that conclusion, in that but for PHA's erroneous perception that Williams was unable to be around firearms because of his mental impairment, Williams would have been eligible for a radio room assignment.

C. The Supreme Court's Decision in *Arline*

In addition to the statutory text and legislative history, the Supreme Court's decision in *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), also requires that "regarded as" employees be entitled to reasonable accommodations. *Arline* involved a claim based on the Rehabilitation Act. The Court pointed out that the Act's definition of "handicapped individual" had been amended to read as follows:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Arline, 480 U.S. at 279. The Court explained that this expansion of the definition was intended "to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" *Arline,* 480 U.S. at 279 (quoting *Southeastern Cmty. Coll. v. Davis,* 442 U.S. 397, 405-406 n.6 (1979)) (alterations in original). The Court held that the teacher plaintiff, who had a contagious but not substantially limiting form of tuberculosis, fell into this category. It found that employers had "an affirmative obligation [under the Rehabilitation Act] to make a reasonable accommodation" for such an employee, *Arline,* 480 U.S. at 289 n.19, and remanded so that the District Court could determine "whether the School Board could have reasonably accommodated her," *id.* at 288-89.

Given that the "regarded as" sections of both Acts play a virtually identical role in the statutory scheme, and the well-established rule that the ADA must be read "to grant at least as much protection as provided by . . . the Rehabilitation Act," *Bragdon v. Abbott,* 524 U.S. 624, 632 (1998), the conclusion seems inescapable that "regarded as" employees under the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled. Of course, additionally, Congress specifically endorsed the *Arline* approach in crafting the "regarded as" prong of the ADA's definition of "disability." Neither the Eighth Circuit's decision in *Weber* nor the Ninth Circuit's decision in *Kaplan* address *Arline.*

D. The "Windfall" Proposition

PHA, arguing the windfall theory to our Court, suggests that Williams, by being "regarded as" disabled by PHA, receives a "windfall" accommodation compared to a similarly situated employee who had not been "regarded as" disabled and would not be entitled under the ADA to any accommodation. The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns – perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA. Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.[19]

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[19] In many cases where an employer regards an employee as having limitations that the employee did not have or limitations greater than the employee's actual limitations, a simple reasonable accommodation can be

(Continued on following page)

VI. *Conclusion*

For the foregoing reasons, we will reverse and remand the District Court's grant of summary judgment in favor of PHA with respect to Williams's ADA and PHRA

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devised to allow the employee to continue working even given the employer's misperception. In such cases, it may be that the employer and employee never reach a meeting of the minds, regardless of who was at fault for failing to do so, as to the employee's actual limitations. Nonetheless, the employee can still be reasonably accommodated such that he or she can perform the essential functions of the position even in light of the employer's misperception. For example, an employer supermarket requires all of its cashiers to stand. One cashier has a back problem that causes discomfort but does not amount to an actual disability. The employer misperceives this back problem as one that prevents the employee from standing for more than an hour, and fires the employee because she cannot stand. Even if the supermarket and cashier never reach a meeting of the minds as to the true extent of the cashier's limitations, the supermarket might, assuming its erroneous perception amounted to a substantial limitation of a major life activity, be required to reasonably accommodate such a "regarded as" disabled employee by, for example, providing a stool.

In our case, it is true that PHA perceived Williams's limitations to be so extensive that no simple solution, such as a stool, would have allowed Williams to keep working while their misperception persisted. Thus, it was critical that PHA engage in good faith in the interactive process and determine the actual extent of Williams's limitations before simply deeming him unable to work, contrary to the opinion of their own psychologist. Instead, as we have indicated, PHA's response (or lack thereof) to Williams's disability has created a material dispute of fact as to whether it failed to engage in good faith in the interactive process. Assuming a jury determines that PHA's perception was inaccurate and that it regarded Williams as disabled, it is PHA's insistence on this erroneous perception and failure to discuss with Williams the true extent of his actual limitations that, as we have explained, potentially amounts to a failure to engage in the interactive process and, thereby, a failure to reasonably accommodate. Accordingly, even where an employer mistakenly regards an employee as so disabled that the employee cannot work at all, the employer still must accommodate a "regarded as" employee by seeking to determine, in good faith, the extent of the employee's actual limitations.

discrimination claims. We will affirm the District Court's summary judgment determination with respect to Williams's retaliation claims and with respect to Williams's cross-motion for summary judgment.[20]

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[20] Williams also appeals the District Court's denial of partial summary judgment in his favor with respect to whether he is disabled, whether PHA breached its duty to engage in the interactive process, and whether PHA failed to provide Williams with a reasonable accommodation. Williams argues, *inter alia*, that PHA "admitted" he was disabled within the meaning of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby "accommodating" him.

We agree with the Sixth and Ninth Circuits, however, that an offer of accommodation does not, by itself, establish that an employer "regarded" an employee as disabled. *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) ("[W]hen an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation."), *clarified in other respects*, 292 F.3d 1045 (9th Cir. 2002); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An employee] cannot show that this provision applies to him merely by pointing to that portion of the record in which his [employer] admitted that he was aware of [the employee's] medical restrictions and modified [the employee's] responsibilities based on them.").

Williams further argues that there is no material dispute of fact with respect to all of the preceding issues. However, as we have indicated, there are factual determinations to be made with respect to each of these issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD R. WILLIAMS, ET AL., Plaintiff,	:	CIVIL ACTION NO. 00-1709
v.	:	
PHILADELPHIA HOUSING AUTHORITY, Defendant.	:	

MEMORANDUM

(Filed Oct. 29, 2002)

EDUARDO C. ROBRENO, J. October 28th, 2002

I. INTRODUCTION

Plaintiff Edward R. Williams ("plaintiff") brought suit against defendant Philadelphia Housing Authority ("PHA") based on claims arising out of plaintiff's employment as a police officer with and subsequent termination by PHA. The plaintiff was temporarily suspended without pay as a result of a heated altercation he had with a superior officer, during and after which plaintiff made a number of profane and threatening remarks. Plaintiff's hiatus from PHA lasted from his suspension, on May 19, 1998, until he was fired, on December 29, 1998. During the period between plaintiff's suspension and subsequent termination, plaintiff underwent various psychological examinations. The examining psychologists concluded that plaintiff suffered from severe depression, and that as a result, plaintiff should be prohibited from carrying a firearm for a temporary period of time.

Based on these events, PHA refused to allow plaintiff to return to work at PHA until plaintiff received medical clearance to carry a firearm once again. In turn, plaintiff requested that PHA allow him to work in a capacity where it would not be necessary to carry a weapon. PHA refused, citing safety concerns, contending that plaintiff would have access to firearms in all available employment positions for which he qualified at PHA.

After the altercation with Captain Geiger, plaintiff stopped coming to work. While out of work, plaintiff drew down all available medical leave to which he was entitled.[1] After he had exhausted all of his medical leave, plaintiff requested in writing and PHA granted a leave of absence on two occasions. After the second leave of absence expired, although directed to do so by PHA, plaintiff did not request any additional leave. As a result of plaintiff's failure to request additional leave, his employment with PHA was terminated on December 29, 1998.

In his complaint, plaintiff alleges disability discrimination under the ADA, retaliation in violation of the ADA and disability discrimination in violation of the PHRA. Before the court are: 1) defendant's motion for summary judgment on all of these claims and 2) plaintiff's motion for partial summary judgment on its claim of disability discrimination for failure to accommodate.

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[1] During the period between plaintiff's suspension and his psychological examination, plaintiff was instructed to report to work in the PHA radio room. PHA refused to allow plaintiff to work in the radio room only after PHA received the results of plaintiff's psychological examination.

For the reasons stated below, the court will grant defendant's motion for summary judgment as to all counts, and correspondingly deny plaintiff's motion for partial summary judgment as to failure to accommodate.

II. CHRONOLOGY AND BACKGROUND[2]

The plaintiff was employed by the PHA as a housing police officer since March 14, 1974. On May, 19, 1998, plaintiff was suspended without pay. According to both parties, plaintiff was suspended as a direct result of a heated confrontation between plaintiff and Captain Edward Geiger, one of plaintiff's superior officers.

On the same night, following the confrontation, plaintiff called a Delaware County Psychological Services Counselor. He spoke with the counselor for approximately thirty minutes. During this conversation, the plaintiff stated that he understood "why people go postal." He also talked about "smoking people" and "having the means to do it." In response to these statements, the counselor insisted that plaintiff go immediately to an emergency room, and informed the plaintiff that if he did not comply voluntarily, he (the counselor) would be forced to involve the police. After responding in a profane and vulgar manner, the plaintiff hung up the phone.

Two days after the incident with Captain Geiger, on May, 21, 1998, Captain Geiger wrote to plaintiff directing him to report to the PHA radio room for duty. Plaintiff,

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[2] The facts recited here are either uncontested or, when contested, they are construed in the light most favorable to plaintiff, the non-movant.

however, never reported to the radio room as directed, but instead, began calling out sick on a daily basis.

Based on these events, PHA requested that plaintiff submit to an independent psychological examination with Dr. Laurene Finley on June 29, 1998. Plaintiff, however, failed to attend the scheduled examination, informing PHA that he was unable to attend the scheduled examination because he was the coach of his son's little league team, and the team had a game scheduled at the time of the appointment.

On two separate occasions, July 29, 1998 and September 22, 1998, PHA advised plaintiff that he had exhausted his available leave and that unless he requested an additional leave of absence, he would be deemed to have voluntarily resigned. In turn, plaintiff twice requested, and was granted,[3] additional leaves of absence.

Meanwhile, plaintiff underwent a psychological examination by Dr. Laurene Finley, the PHA designated psychologist.[4] In a letter dated October 10, 1998, Dr. Finley wrote, in relevant part:

> Mr. Williams is fully capable of working, for a temporary period, in either an administrative

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[3] While the pleadings are not entirely clear as to whether plaintiff's second request was, in fact, approved by PHA, for the purposes of this opinion, the court may assume that plaintiff's request was approved, since plaintiff was not terminated for failing to respond to PHA's directive that he request a written leave of absence.

[4] Before submitting to an examination by Dr. Finley, plaintiff was examined by his own treating psychologist. The conclusions arrived at by plaintiff's treating psychologist bear little relevance to the issues examined here; and in what little relevance they do bear, they support a finding in favor of PHA.

> and/or clerical capacity. He should not carry a weapon, however, for a minimum period of three months. He can work around other officers who will be carrying their weapon. . . . [I]t is anticipated that [plaintiff] will be able to fully return to active duty, resuming his usual job responsibilities after this approximate three month period. However, a more definite frame cannot be provided at this time, pending a reevaluation.

On October 13, 1998, plaintiff requested that PHA temporarily reassign him to work in the PHA training unit. Assistant Chief Hughes, on behalf of PHA, responded, in writing, that "it is the position of this police department . . . [that] the specific position you are requesting is not open to you due to your on-going treatment with Dr. Lauren[e] Finley. . . . " Assistant Chief Hughes further noted that "[t]his department has also concluded that once you have completed all of your treatment . . . with authorization to carry firearms once again, you are to report back to uniform patrol duty."[5]

On October 21, 1998, plaintiff requested an assignment "in the [PHA] radio room until [his] 3 month evaluation [was] over. . . . " If assigned to the radio room, plaintiff would not have been required to carry a gun. Plaintiff's request, however, was denied once again.

Noting safety concerns, as well as the anticipation that plaintiff would return to work as a police sergeant in as early as 90 days, as the basis for its decision, PHA denied the request. PHA also noted that plaintiff would have access to firearms in the radio room, and would be

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[5] The plaintiff does not challenge PHA's refusal to assign him to the training unit.

working closely with others who carried firearms. PHA maintained that, in light of plaintiff's insubordinate and threatening behavior towards Captain Geiger, coupled with plaintiff's talk of "smoking people," "going postal," and "having the means to do it," placing plaintiff in the radio room would have created a risk to other PHA employees. Finally, PHA claimed that no other positions were available at PHA for someone with plaintiff's qualifications.

On December 3, 1998, Carl Marinelli, PHA's assistant General Manager of Human Resources, informed plaintiff that, once again, he had exhausted all his leave time at PHA, and that to maintain his employment, he needed to request an additional leave of absence. Mr. Marinelli's letter further informed the plaintiff that if he did not request an additional leave of absence by December 18, 1998, his employment with PHA would be terminated. Included within the letter was Mr. Marinelli's telephone number. Plaintiff however, by his own admission, never called Mr. Marinelli or otherwise responded to the letter.[6]

On December 29, 1998, Mr. Marinelli wrote plaintiff a second letter, informing plaintiff that his employment with PHA had been terminated. The letter stated that PHA had terminated plaintiff's employment based upon plaintiff's failure to request an additional leave of absence or otherwise contact PHA in response to the December 3, 1998 letter. PHA maintains that plaintiff's failure to respond to this letter was the sole reason behind PHA's decision to terminate plaintiff's employment.

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[6] Plaintiff also acknowledged receipt of the December 3, 1998 letter from Mr. Marinelli.

During the time between plaintiff's initial suspension on May 19, 1998 and the termination of his employment on December 29, 1998, the plaintiff continued to coach his son's little league team and in that role, he interacted, as necessary, with the participating children and their parents. Additionally, plaintiff remained involved in the community until he accepted a job in late 1999 that required him to work nights. Furthermore, plaintiff indicated that during this time period, he applied for jobs with SEPTA, Avis Rent-a-Car, Budget Rent-a-Car, and PGW, and that in his opinion, he could have performed the essential functions of those jobs, as well as those necessary to work in PHA's radio room, throughout 1998.[7]

On March 31, 2001, the plaintiff filed the instant action, alleging the following causes of action: 1) discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"); 2) retaliation in violation of Title VII and the ADA; 3) discrimination in violation of the Pennsylvania Human Relations Act ("PHRA"); 4) intentional and/or negligent infliction of emotional distress; 5) defamation, false light, and invasion of privacy; 6) breach of implied covenant of good faith and fair dealing; 7) wrongful discharge; 8) discrimination in violation of the Age Discrimination in Employment Act ("ADEA"); 9) loss of consortium (brought on the part of Angelynne Williams); and 10) punitive damages.

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[7] Plaintiff also claims that he could have returned to active duty at PHA as a police officer if only PHA had gotten rid of Captain Geiger and other superior officers that plaintiff found objectionable.

On June 8, 2001, the court dismissed plaintiff's claims: 1) under Title VII; 2) for intentional and negligent infliction of emotional distress; 3) for defamation, false light, and invasion of privacy; 4) for breach of the implied covenant of good faith and fair dealing; 5) for discrimination under the ADA; and 6) for punitive damages.

On December 20, 2001, the court dismissed plaintiff's claims for wrongful discharge and loss of consortium.

Before the court are cross-motions for summary judgment. PHA has moved for summary judgment on the remaining counts: 1) disability discrimination under the ADA; 2) retaliation in violation of the ADA; and 3) disability discrimination in violation of the PHRA.[8] Subsequently, the plaintiff moved for partial summary judgment on the disability discrimination claim, to the extent that it is based upon a failure to accommodate.

III. DISCUSSION

A. The Standard for Summary Judgment.

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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[8] The PHRA follows the same burden-shifting formula and standards as the ADA. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 104-05 (3d Cir. 1996); *Harris v. SmithKline Beecham Corp.*, 27 F. Supp. 2d 569, 576 (E.D. Pa. 1998) (applying the same standards to Title VII, Section 1981, and PHRA claims), *aff'd mem*, 203 F.3d 816 (3d Cir. 1999). Thus, the court's analysis, findings and conclusions herein apply to plaintiff's claims under the ADA and the PHRA.

Fed. R. Civ. P. 56(c). The role of the trial court is to determine whether there are material factual issues that merit a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In making that determination, the court must give the nonmoving party the benefit of all reasonable inferences that might be drawn from the underlying facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986); *Sempier v. Johnson and Higgins*, 45 F.3d 724, 727 (3d Cir. 1995) (en banc). Summary judgment is appropriate if the court finds that the record "could not lead a rational trier of fact to find for the nonmoving party, [and] there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

B. Plaintiff has Failed to Establish a Claim of Unlawful Retaliation under the ADA.

The ADA's retaliation provision provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a).

The Title VII framework for the analysis of retaliation claims is also applicable to ADA claims. Similarly, the now familiar burden shifting paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies to retaliation claims under the ADA in cases based on indirect evidence of discrimination. *Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000).

To establish a prima facie case of retaliation under the ADA, a plaintiff-employee must show that: 1) he engaged in "protected employee activity;" 2) the defendant-employer took adverse action against the employee, either

contemporaneous with or after the occurrence of the protected activity in which the employee engaged; and 3) there exists "a causal connection between the employee's protected activity" and the adverse action taken by the employer. *Shaner*, 204 F.3d at 500 (citing *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997)).

Once the employee has established a prima facie case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for the adverse employment action. *See Shaner*, 204 F.3d at 500. "The employer's burden at this stage is 'relatively light: it is satisfied if the defendant articulates *any* legitimate reason for the [adverse employment action]; the defendant need not prove that the articulated reason actually motivated the [action]." *Krouse*, 126 F.3d at 500-01 (emphasis added) (alteration in original) (quoting *Woodon v. Scott Paper Co.*, 109 F.3d 913, 920 n.2 (3d Cir. 1997)). While the employer has the burden of production for articulating a non-discriminatory and non-retaliatory reason for the adverse employment action, the burden of persuasion, however, remains at all times with the employee. *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993).

Once the burden of production is satisfied by the employer, the employee must be able to convince the factfinder that: 1) the employer's proffered explanation is false and pretextual and 2) retaliation was the real reason for the adverse employment action. *Krouse*, 126 F.3d at 501.; *see Woodson*, 109 F.3d at 920 n.2 (discussing proper standard to apply under Title VII retaliation case); *see also St. Mary's*, 509 U.S. at 519 ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.") (emphasis omitted). In the final analysis, it is the employee's burden to

prove by a preponderance of the evidence that, despite any legitimate reasons for the adverse action that are proffered by the employer, "retaliatory animus played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." *Krouse*, 126 F.3d at 501 (citing *Woodson*, 109 F.3d at 931-35).

In determining whether to grant summary judgment in favor of the employer, based upon the third prong of the *McDonnell Douglas* framework, "the court focuses on whether there is sufficient evidence from which a jury could conclude that the purported reasons for defendant's adverse employment actions were in actuality a pretext for intentional race [or disability] discrimination," or, in this case, retaliatory animus. *Jones v. Sch. Dist. of Philadelphia*, 198 F.3d 403, 412-13 (3d Cir. 1999) (quoting *St. Mary's*, 509 U.S. at 515). In order to withstand summary judgment on the issue of pretext, the plaintiff must be able to point "to some evidence, direct or circumstantial, from which a factfinder would reasonably either: (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory [or retaliatory] reason was more likely than not a motivating or determinative cause of the employer's action." *Jones*, 198 F.3d at 413 (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) and *Sheridan v. E.I. Dupont de Nemours and Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc).

As the Third Circuit points out, "[t]o discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken. . . . *Fuentes*, 32 F.3d at 765. On the other hand, the plaintiff need not produce direct evidence of retaliatory intent. *See Shaner*, 204 F.3d at 503 (citing *Pivirotto v.*

Innovative Sys., Inc., 191 F.3d 344, 352 n.4 (3d Cir. 1999)). Rather, the plaintiff can satisfy his burden on summary judgment by producing circumstantial evidence that demonstrates "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory [or non-retaliatory] reasons." *Fuentes*, 32 F.3d at 765 (citations and internal quotation marks omitted) (emphasis and first alteration in original).

Here, the plaintiff alleges two incidents of retaliation: 1) PHA's failure to provide "reasonable accommodation" by transferring the plaintiff to the radio room as he had requested; and 2) PHA's decision to terminate plaintiff's employment on December 29, 1998.

1. Plaintiff has failed to establish a claim for retaliation by failure to accommodate.

The plaintiff's retaliation claim has no merit to the extent that it is based upon PHA's failure to accommodate his request for a transfer to the radio room. The only evidence plaintiff puts forth in support of his retaliation claim based on PHA's alleged failure to accommodate is: 1) that he, in fact, requested an accommodation in the form of a transfer to the radio room; and 2) that PHA denied this request. The plaintiff asserts that PHA's failure to accommodate was in "retaliation" of his request for a transfer to the radio room, and thus, PHA has unlawfully retaliated against him in violation of the ADA. The court does not agree.

In essence, the plaintiff makes the circular argument that PHA denied his request to be transferred to the radio room in retaliation for his asking to be transferred to the radio room. Assuming, without deciding, that a request for a reasonable accommodation constitutes protected activity,[9] and that defendant's failure to transfer the plaintiff to the radio room, as requested, constitutes an adverse employment action, plaintiff has nonetheless failed to establish a retaliation claim because he has failed to establish the requisite causal connection between the protected activity and the adverse employment action.

Literally, of course, the denial of the transfer followed the request made by plaintiff. This averment proves no more than night follows day or that Tuesday follows Monday. The "causal connection" sought, and as to which plaintiff offers nothing in support, is not that the adverse employment action merely followed the protected activity in the chronological sense. Rather, what must be shown is that retaliatory animus on the part of the employer, which resulted from plaintiff's engaging in protected activity,

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[9] PHA, in its reply brief, notes that a number of courts have questioned whether, based upon the plain language of the ADA, an employee's request for a reasonable accommodation constitutes protected activity under the ADA. *See Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997); *Nerosa, et al. v. Storecast Merchandising Corp.*, 2002 WL 1998181 at *7 n. 11 (E.D. Pa. August 28, 2002); *Williams v. Eastside Lumber Yard*, 190 F. Supp. 2d 1104, 1120 (S.D. Ill. 2001). Many courts, however, have inferred or assumed that such action is protected. *See Nerosa*, 2002 WL 1998181 at *7 n.11. Defendant urges the court to hold that a request for a reasonable accommodation does not constitute protected activity under the ADA. Assuming *arguendo* that a request for a reasonable accommodation does, in fact, constitute protected activity, nonetheless, the court finds that plaintiff has failed to establish a claim of retaliation. Thus, the court need not, and will not, decide this issue.

was a substantial factor in motivating the adverse employment decision.[10] *See Shaner*, 204 F.3d at 501; *Krouse*, 126 F.3d at 501; *San Filippo v. Bongiovanni, et al.*, 30 F.3d 424, 430 (3d Cir. 1994).

Accordingly, defendant's motion for summary judgment will be granted as to plaintiff's claim of retaliation to the extent that it is based upon the defendant's denial of the plaintiff's transfer request.

2. Plaintiff has failed to establish a claim for retaliation by termination.

The plaintiff also fails to establish a claim of retaliatory termination. Termination, of course, is the paradigmatic form of adverse employment action. Even assuming that the plaintiff's request to be transferred to the radio room constitutes protected activity, and that the plaintiff

[10] Plaintiff's claim, to the extent that it is based upon the defendant's denial of his request for a reasonable accommodation, is stated as a retaliation claim in form, but is, in substance, a claim of failure to accommodate. *See Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001) (noting plaintiff's attempt to "reclothe" failure to accommodate claim as a claim of retaliation); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1288 (11th Cir. 1997) ("[T]he acts [the plaintiff] describes relate directly to her 'reasonable accommodation' claim, not her retaliation claim, and accordingly provide no basis for denying summary judgment on this issue."); *Parker v. Noble Roman's, Inc.*, 1997 WL 839138 at *8 (S.D. Ind. Dec. 10, 1997) ("[a]n examination of [plaintiff's] allegations, however, leads us to conclude that while such allegations may reflect a refusal to accommodate [plaintiff's] disability, they do not amount to retaliation"). Thus, the court will address this claim in its proper context, as a claim of failure to accommodate, below.

has established the requisite causal connection between his request and his subsequent termination,[13] plaintiff's retaliatory termination claim still has no merit.

According to the PHA, it terminated the plaintiff's employment because the plaintiff had exhausted all available leave time to which he was entitled and failed to request a leave of absence or otherwise contact PHA in response to Carl Marinelli's December 3, 1998 letter.[14] PHA states that the plaintiff had the opportunity to maintain his employment by simply contacting Mr. Marinelli (whose telephone number was included in the December 3, 1998 letter) and requesting a leave of absence. This, the plaintiff admits he failed to do. Thus, on December 29, 1998, in accordance with the PHA personnel policy regarding leave, the plaintiff's employment with PHA was terminated. This explanation satisfies PHA's burden of producing a legitimate non-retaliatory reason for the adverse employment action.

In turn, the plaintiff presents very little in the way of evidence that may demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in

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[13] It should be noted, once again, that the court will not decide whether plaintiff's request constitutes protected activity; nor is the court concluding that plaintiff has established the necessary causal connection. The court is merely assuming, for the sake of judicial economy, that these elements have been established. In fact, it appears to the court that, under virtually the same analysis used to conclude that the plaintiff has failed to establish that the defendant's articulated reasons are pretextual, plaintiff has failed to establish the requisite causal connection.

[14] The December 3, 1998 letter stated that if plaintiff did not request a leave of absence by December 18, 1998, PHA would terminate the plaintiff's employment.

the employer's proffered legitimate reasons for its action." *Fuentes,* 32 F.3d at 765. Specifically, the plaintiff points to two instances that allegedly demonstrate that the defendants proffered reasons for terminating the plaintiff are pretextual.

First, the plaintiff cites an answer given by the defendant in responding to an interrogatory in this litigation, which stated that the defendant was without sufficient knowledge to enable it to admit or deny whether or not a certain memorandum was ever written. According to the plaintiff, on September 22, 1998, an interoffice memorandum was written which stated that the plaintiff had until September 28, 1998 to request a medical leave of absence or he would be fired. On September 28, plaintiff responded in writing to the memorandum in question. The defendant has since admitted that these writings exist. Nonetheless, the defendant has never suggested that the September 22, 1998 memorandum had anything to do with plaintiff's termination. In fact, the plaintiff was not terminated for any reason connected to the September 22, 1998 memorandum because he, in fact, responded to it. The only reason presented by the defendant for terminating the plaintiff was his failure to respond to the December 3, 1998 letter from Mr. Marinelli, which the plaintiff admits he failed to do. Not only does the evidence offered by plaintiff fail to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action," *Fuentes,* 32 F.3d at 765, it is irrelevant to the issue. If anything, this evidence serves to buttress the defendant's proffered legitimate reason, in that it shows that adverse employment action was taken only when plaintiff failed to

respond to letters instructing him to request additional leave.

Secondly, the plaintiff points to another memorandum which states that "if the plaintiff does not apply for a medical leave of absence by November 30, 1998, it is the position of this department that human resources terminate [the plaintiff] according to PHA personnel policy regarding medical leave." Presumably the plaintiff presents this as evidence that the decision to terminate the plaintiff was made even before the December 3, 1998 letter was written. The court disagrees. To the contrary, viewed in the light most favorable to the plaintiff, the only logical inference that may be drawn from the memorandum is that PHA was restating its directive that unless plaintiff make a written request for an additional leave of absence or otherwise contact PHA regarding the same, he would be terminated. According to the plain terms of the memorandum, it is clear that had plaintiff requested additional leave, he would not have been terminated.

The only other evidence that appears in the pleadings and may be pertinent to this issue consists of: 1) plaintiff's receipt of and response to a memorandum written on July 29, 1998, which stated that plaintiff would exhaust all of his sick leave and annual leave benefits by August 20, 1998, and that failure to request an extended leave of absence would result in termination; 2) plaintiff's October, 13, 1998 request to be transferred to the radio room, which, for the purpose of this case, has been assumed by the court to constitute protected activity, coupled with the fact that plaintiff was, indeed, terminated on December 29, 1998.

First of all, the fact that the plaintiff previously received a writing similar to the December 3, 1998 letter from Mr. Marinelli, and that after responding to the writing, he was not terminated, supports the defendant's proffered reason for termination. There is simply no evidence from which a reasonable jury could conclude that had plaintiff responded to the December 3, 1998 letter as he did to the previous requests by PHA that he request additional leaves of absence, he would have been terminated nonetheless.

Secondly, the "mere fact that adverse employment action occurs after [the employee has engaged in protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden." *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1302 (3d Cir. 1997).[15] The Third Circuit has recognized that "our cases are seemingly split on the question of whether the timing of the allegedly retaliatory action can, by itself, *ever,* support a finding of causation." *Krouse,* 126 F.3d at 503 (internal quotations omitted) (emphasis in original); *compare Woodson,* 109 F.3d at 920 (stating in dicta that "temporal proximity between the protected activity and the termination is sufficient to establish a causal link") *with Delli Santi v. CNA Ins. Cos.,* 88 F.3d 192, 199 n.10 (3d Cir. 1996) ("timing alone will not suffice to prove retaliatory motive"). However, "[e]ven if timing alone could ever be sufficient to establish [retaliatory motive], the timing of the alleged retaliatory action

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[15] Although, in making this statement, the court in *Robinson.*, was addressing the issue of whether there existed a causal connection between the adverse employment action and plaintiff's protected activity, *Robinson,* 120 F.3d at 1302, the reasoning of the Third Circuit is equally applicable here.

must be 'unusually suggestive' of retaliatory motive before the causal link will be inferred." *Krouse,* 126 F.3d at 503 (quoting *Robinson,* 120 F.3d at 1302); *see, e.g., Jalil v. Advel Corp.,* 873 F.2d 701, 708 (3d Cir. 1989) (causal link established where discharge followed rapidly, only two days later, after employer became aware that employee engaged in protected activity).

In the case at bar, the protected activity (i.e., the request for a transfer to the radio room) occurred on October 21, 1998. The adverse employment action (i.e., plaintiff's termination) occurred on December 29, 1998. Under the circumstances of this case, and given the intervening events, including plaintiff's failure to request additional leaves of absence after his previous leave had expired, no reasonable jury could conclude that the two events shared a causal link.

Finally, the plaintiff produces no evidence that his termination was not in accordance with PHA's personnel policy regarding medical leave, or that similarly situated employees who had not requested a transfer were not terminated despite failing to request additional leave after PHA ordered them to do so. *See Pivirotto,* 191 F.3d at 354; *Krouse,* 126 F.3d at 503.

Therefore, the court finds that the plaintiff has failed to produce "sufficient evidence from which a jury could conclude that the purported reasons for defendant's adverse employment actions were in actuality a pretext" for retaliatory animus, *Jones,* 198 F.3d at 412, and that therefore, defendant is entitled to judgement as a matter of law. Accordingly, defendant's motion for summary judgment will be granted as to plaintiff's retaliatory termination claim.

C. Plaintiff has Failed to Establish a Claim of Disparate Treatment under the ADA.

1. Plaintiff has failed to establish a failure to accommodate claim under the ADA.

Under the ADA, employers are prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined by the ADA as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 306 (3d Cir. 1999).

Accordingly, in order for a plaintiff to establish a prima facie case of discrimination under the ADA, he must show that: 1) he is "disabled" within the meaning of the ADA; 2) he is otherwise qualified for the job; and 3) "he has suffered an adverse employment decision as a result of discrimination." *See Shaner,* 204 F.3d at 500 (citing *Gaul v. Lucent Techs., Inc,* 134 F.3d 576, 580 (3d Cir. 1998).

Discrimination under the ADA, however, "encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities." *Taylor,* 184 F.3d at 306. Thus, under the ADA, an employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide "reasonable accommodations" for the disability, unless

doing so would impose undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a); *Taylor,* 184 F.3d at 306.

A "disability" is defined by the ADA as: 1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; 2) a record of such impairment; or 3) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Taylor,* 184 F.3d at 305-06. The regulations define "major life activities" as "those basic activities that the average person in the general population can perform with little of no difficulty," including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. *See* 29 C.F.R. §1630.2(1).

Plaintiff contends that his mental impairment (depression) substantially limited the major life activities of employment and interaction with family, friends and coworkers. The defendant does not contend that plaintiff did not suffer from a mental impairment, nor does the defendant contend that employment and social interaction do not constitute major life activities. The defendant argues instead, that: 1) the plaintiff's depression did not act to substantially limit either of these major life activities; 2) the plaintiff did not have a record showing that his depression substantially limited a major life activity; and 3) the defendant did not regard plaintiff's depression as substantially limiting his ability to work or socially interact with others.

a. Plaintiff does not have a disability under the ADA, to the extent that such disability is based upon plaintiff's inability to interact with others.

With regard to plaintiff's ability to socially interact with others, it is clear that plaintiff's depression did not substantially limit this major life activity. Circuit courts that have addressed whether social interaction constitutes a major life activity have arrived at conflicting results. *Compare Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (holding that "the ability to get along with others" is not a major life activity); *with McAlindin v. County of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999) (holding that "[b]ecause interacting with others is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity'"). The Third Circuit has not spoken on the issue. *See Cohen v. Two. of Cheltenham*, 174 F. Supp. 2d 307, 330 (E.D. Pa. 2001).

Even if the ability to interact with others constitutes a major life activity, it is clear that "mere trouble getting along with co-workers is not sufficient to show a substantial limitation." *McAlindin*, 192 F.3d at 1235. Plaintiff's burden is to show an inability to interact with people in general, rather than a mere inability to get along with specific individuals. *See Steele v. Thoikol Corp.*, 241 F.3d 1248, 1254-55 (10th Cir. 2001).

Thus, assuming without deciding that social interaction is a major life activity, plaintiff's claim of disability fails. In this case, the evidence shows that plaintiff only had problems interacting with Captain Geiger and some other individuals at PHA. In fact, plaintiff, himself, has admitted that following his confrontation with Captain

Geiger: 1) he continued to coach his son's little league team, attended two games a week, and was able to interact with the children and parents, as necessary, in his role as coach; 2) he continued to stay active in the community; 3) he was able to interact with others to the extent necessary to perform jobs for which he had applied after the confrontation; 4) he was able to interact with others to the extent necessary to work in the PHA radio room; and 5) he could have continued his employment at PHA if PHA had gotten rid of Captain Geiger and others who had "disrespected him" over the years. Thus, plaintiff, through his own admissions supplies all the evidence necessary, and no evidence to the contrary, to enable the court to conclude that plaintiff's inability to get along with others was limited to only certain individuals. Moreover, plaintiff provides no evidence that he was regarded as, or had a record of, suffering from a mental or physical impairment that substantially limited his ability to interact with others.

Accordingly, plaintiff's motion for partial summary judgment will be denied and defendant's motion for summary judgment will be granted, as to the issue of plaintiff's claim of disability, to the extent that it is based upon his inability to interact with others.

b. Plaintiff does not have a disability under the ADA, to the extent that such disability is based upon the major life activity of working.

i. Plaintiff's depression does not substantially limit the major life activity of working.

In determining whether an impairment "substantially limits" a major life activity, the court should consider the following factors: 1) the nature and severity of the impairment; 2) the duration or expected duration of the impairment; and 3) the permanent or expected long term impact. 29 C.F.R. § 1630.2(j)(2); *see Taylor,* 184 F.3d at 307. For an impairment to substantially limit a major life activity, the impairment must be "considerable" or "specified to a large degree." *See id.*

Justice O'Connor, writing for the Supreme Court, has explained the type of evidence needed to establish a substantial limitation on the major life activity of working. *See Sutton v. United Air Lines,* 527 U.S. 471, 491-92 (1999). As explained by Justice O'Connor, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Id.* at 491.

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of

> different types of jobs are available, one is not precluded from a broad range of jobs.

Id. at 492. Thus, in order for a plaintiff to establish that he or she is disabled, as defined by the ADA, based upon having a mental or physical impairment that substantially limits the major life activity of working, he or she must provide evidence that he is unable to perform a broad range of jobs. *See id.* The plaintiff has failed to meet this burden.

The plaintiff asserts, and the court agrees, that, as a result of his depression, the plaintiff was temporarily prohibited from carrying a firearm. Thus, plaintiff's depression served to temporarily limit his employment opportunities to jobs which did not require him to do so. Although both parties seem to agree that this prohibition was temporary, they are in disagreement regarding its actual duration. Defendant claims that the prohibition covered a period of only three months. Plaintiff, on the other hand, while apparently admitting that the prohibition was temporary, asserts that the actual term of the prohibition was indefinite. Excluding this disagreement as to the actual term of plaintiff's prohibition, there is no material dispute amongst the parties as to the employment limitations that result from plaintiff's depression. Moreover, the plaintiff provides no evidence of his being subject to any additional limitations with regard to the major life activity of working.

Viewed in the light most favorable to the plaintiff, the evidence presented by the parties supports a finding that plaintiff's depression served, at most, to temporarily limit the jobs that were available to the plaintiff to those jobs that do not require him to carry a firearm. Plaintiff argues

that in light of his limited education, this employment limitation substantially limits the employment opportunities that are available to him. Aside from this conclusory assertion, plaintiff has failed to provide any evidence that his depression precludes him from obtaining "a broad range of jobs." *See Sutton,* 527 U.S. at 492. In fact, plaintiff at his deposition, admitted that he "could have performed [the] duties" of a bus driver, chauffeur, and tow truck operator and that he could have worked for SEPTA, Budget Rent-a-Car and Avis Rent-a-car, as well as in the radio room at the PHA. Accordingly, the court finds that "a host of different types of jobs are available" to plaintiff, and thus, he is "not precluded from a broad range of jobs." *See id.; see also Tice v. Centre Area Transp. Auth.,* 247 F.3d 506, 512-13 (3d. Cir. 2001) (holding that plaintiff, who was unable to drive a bus because of a back injury, was not "disabled" under the ADA); *Knoll v. Southeastern Pa. Transp.,* 2002 WL 31045145 at *9 (E.D. Pa. September 11, 2002) (holding that plaintiff, who could not be a traffic officer because of poor vision, was not "disabled" under the ADA); *Volitis v. Merck & Co., Inc.,* 129 F. Supp. 2d 765, 772 (E.D. Pa. 2001) (holding that plaintiff, who could not walk for more than two hours, stand for more than three hours, sit for more than six hours and lift over 50 pounds, was not "disabled" under the ADA); *Ponko v. Pa. State Univ.,* 84 F. Supp. 2d 589, 594 (M.D. Pa. 2000) (holding that plaintiff, who suffered from idiopathic epilepsy, was not "disabled" under the ADA). Thus, under *Sutton,* the court holds that plaintiff has failed to establish that his depression substantially limited the major life activity of working.

ii. PHA did not regard plaintiff as having, nor did plaintiff have a record of having, a mental or physical impairment that substantially limited the major life activity of working.[14]

In order for an individual to prove that he is "regarded as" disabled, and therefore "disabled" within the meaning of the ADA, he must show that either:

> (1) a covered entity mistakenly believes that [he] has a physical [or mental] impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have

[14] A number of courts have held that an employer need only accommodate actual disabilities. As such, it is the position of those courts that a plaintiff cannot base a failure to accommodate claim on being regarded as having, or having a record of, an impairment that substantially limits a major life activity. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000); *Workman v. Frito-Lay. Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998). *But see Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996) (holding that "regarded as" employees are entitled to reasonable accommodations). Although the Third Circuit has indicated, in dicta, that logic supports the conclusion that only actual disabilities must be accommodated, it has explicitly declined to decide the issue. *See Buskirk v. Apollo Metals*, 2002 WL 31102694 at *12 n.2 (3d Cir. September 20, 2002). It is unnecessary that this question be addressed here, however, because, in the case at bar, the court concludes that, as a matter of law, plaintiff is neither regarded as, nor has a record of, having an impairment that substantially limits a major life activity.

> or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Sutton, 527 U.S. at 489. The Third Circuit has pointed out that the definition of "substantially limited" remains the same for a "regarded as" disabled plaintiff. *See Tice*, 247 F.3d at 514. Thus, to establish a disability under the ADA, based on being regarded as disabled, the plaintiff must show that PHA believed that, as a result of plaintiff's depression, the plaintiff was "precluded from a broad range of jobs." *Sutton*, 527 U.S. at 489, 492.

The only evidence presented by plaintiff to show that PHA's conception of plaintiff's impairment was more limiting than plaintiff's actual impairment consists of PHA's refusal to allow the plaintiff to work in the radio room.[15] PHA defended this decision upon safety concerns.

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[15] Plaintiff makes much of the opinion of Dr. Finley that plaintiff should only be precluded from jobs which would require him to carry a gun. Reliance on Dr. Finley's opinion is misguided.

First of all, for the reasons stated above, plaintiff's actual disability only limits the plaintiff from working in a job which requires him to carry a gun. Moreover, plaintiff has a record of no greater disability. Thus, plaintiff's mental impairment does not qualify as a disability as defined by the ADA because, under *Sutton*, plaintiff is not "precluded from a broad class of jobs," and is therefore not "substantially limited" in the major life activity of working.

PHA's refusal to transfer plaintiff to the radio room does, however, affect the analysis of whether plaintiff qualifies as disabled under the ADA because PHA "regards" him as being disabled, but it does not affect the conclusion. PHA's refusal to transfer plaintiff to the radio room, is evidence that PHA "regarded" plaintiff as having a disability that was more limiting than his actual disability. Plaintiff's actual disability only limits plaintiff from being employed in a capacity in which he would be required to carry a firearm. While PHA's refusal to transfer plaintiff to the radio room, and its proffered reason for its refusal, serves as evidence that PHA "regarded" plaintiff as having a

(Continued on following page)

Once again, the court will view this evidence in the light most favorable to the plaintiff.

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disability that not only precluded him from being employed in a capacity in which he was required to carry a gun, but also precluded him from being employed in a capacity in which he had access to guns or would work around others who carried guns. Thus, PHA's perception of plaintiff's disability was clearly more limiting than his actual disability or record of disability.

Nonetheless, even PHA's more limiting perception of plaintiff's disability does not rise to the level of a "disability" as defined under the ADA and *Sutton*. This is so because, even if plaintiff's disability was as limiting as PHA apparently perceived it to be, it would still not preclude plaintiff from a "broad range of jobs" under *Sutton*, and would therefore not "substantially limit" the major life activity of working.

Secondly, PHA's refusal to transfer plaintiff to the radio room has no effect on the analysis of plaintiff's claim that PHA denied plaintiff's request to be transferred to the radio room in retaliation for his request to be transferred. As discussed in Part III. B. 1. of the opinion, plaintiff's retaliation claim, to the extent that it is based upon PHA's refusal to accommodate his request is not a claim of retaliation, but a failure to accommodate claim, and thus, must fail for the reasons stated above (plaintiff is not "disabled" under the ADA).

Finally, as addressed above, if the court assumes that a request for a reasonable accommodation constitutes protected activity, plaintiff may be able to state a prima facie case of retaliatory termination. Plaintiff has not produced enough evidence, however, to rebut PHA's proffered legitimate reasons for terminating plaintiff. PHA's refusal to transfer plaintiff to the radio room, where he would not be required to carry a gun, despite Dr. Finley's conclusion that Mr. Williams should only be prohibited from jobs for which he would be required to do so, could be viewed as evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the PHA's proffered legitimate reasons for terminating plaintiff's employment. This evidence, however, when viewed in combination with the facts that PHA thrice instructed plaintiff to request additional leaves of absence, in accordance with PHA personnel policy, and he was fired only after ignoring PHA's third request, is insufficient for a reasonable jury to conclude that PHA's proffered reasons were pretextual.

PHA's unwillingness to allow the plaintiff to work in a position where he would have access to firearms, at most, demonstrates that PHA regarded the plaintiff as having an impairment that precluded him from carrying a firearm, having access to a firearm, or being in close proximity to other individuals who carry firearms. Under *Sutton,* such a limitation does not substantially limit the major life activity of working because it does not preclude plaintiff from employment in a "broad class of jobs," *id.*, but rather it limits plaintiff's ability to work only in the PHA radio room or a job that requires plaintiff to carry a firearm, have access to a firearm, or be in close proximity to other individuals who carry firearms.

Under the circumstances, the court concludes, as a matter of law that plaintiff was not disabled nor regarded as disabled by PHA, and that he does not have a record of a disability.[16] Therefore, the court will deny plaintiff's motion for partial summary judgment, as to plaintiff's failure to accommodate claim, and grant defendant's motion for summary judgment as to the same.

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[16] While the plaintiff has, indeed, produced evidence of having a record of a mental impairment, the plaintiff has failed to provide any evidence of having a record of a disability the would raise plaintiff's limitations to a level that would substantially limit the major life activity of working. The plaintiff's record of mental impairment states only that plaintiff suffers from depression, but provides no evidence that plaintiff's depression substantially limits any major life activity under *Sutton.*

2. Plaintiff has failed to establish a claim of disparate treatment under the ADA, to the extent that it is based upon discriminatory termination.

The above analysis regarding plaintiff's failure to establish that he is disabled as defined by the ADA is equally applicable to this claim. Accordingly, the court finds that plaintiff has failed to establish a claim of disparate treatment under the ADA, to the extent that it is based upon discriminatory termination, because plaintiff does not qualify as disabled under the ADA.

Moreover, even if the plaintiff had establish disability under the ADA, his claim of discriminatory termination would fail nonetheless. The *McDonnell Douglas* burden shifting framework, as described above, also applies to disparate treatment claims under the ADA. *See Shaner,* 204 F.3d at 500. Thus, once the plaintiff has established a prima facie case of disparate treatment based upon discriminatory termination, the burden shifts to the defendant to articulate any legitimate reason for terminating the plaintiff. *See id.* Once the defendant has satisfied the burden of production, the burden shifts to the plaintiff to provide sufficient evidence to persuade the factfinder that the defendant's proffered reason is a pretext for discrimination. *See id.* at 500-01; *Jones,* 198 F.3d at 412; *Krouse,* 126 F.3d at 501; *Woodson,* 109 F.3d at 931-35; *Sheridan,* 100 F.3d at 1067; *Fuentes,* 32 F.3d at 764.

The court's analysis in Part III. B. 2. of this memorandum, regarding plaintiff's claim of retaliation by termination, is applicable here as well. Likewise, the court finds that the plaintiff has failed to provide sufficient evidence that would demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the

employer's proffered legitimate reasons for its action," *Fuentes*, 32 F.3d at 765, that a reasonable jury could rationally "conclude that the purported reasons for defendant's adverse employment actions were in actuality a pretext for [discrimination]." *Jones*, 198 F.3d at 412-13 (quoting *St. Mary's*, 509 U.S. at 515). Therefore, even assuming that plaintiff is able to establish a prima facie case of discriminatory termination under the ADA, plaintiff's claim fails under the third prong of the *McDonnell Douglass* paradigm. Accordingly, defendant's motion for summary judgment will be granted as to plaintiff's claim of discriminatory termination.

IV. CONCLUSION

Based on the foregoing analysis, the court concludes that the plaintiff has failed to establish a claim of retaliation and disability discrimination under the ADA and PHRA. Accordingly, defendant's motion for summary judgment (doc. no. 41) is granted, and plaintiff's motion for partial summary judgment (doc. no. 48) is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD R. WILLIAMS, ET AL., Plaintiff,	:	CIVIL ACTION NO. 00-1709
v.	:	
PHILADELPHIA HOUSING AUTHORITY, Defendant.	:	

ORDER

AND NOW, on this 28th day of October, 2002, upon consideration of defendant's motion for summary judgment (doc. no. 41) and plaintiff's cross-motion for partial summary judgment (doc. no. 48), and all replies and responses thereto, it is hereby **ORDERED** that defendant's motion for summary judgment (doc. no. 41) is **GRANTED**. It is further **ORDERED** that plaintiff's cross-motion for summary judgment is **DENIED**.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno J
EDUARDO C. ROBRENO J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD R. WILLIAMS, ET AL., Plaintiff,	:	CIVIL ACTION NO. 00-1709
v.	:	
PHILADELPHIA HOUSING AUTHORITY, Defendant.	:	

JUDGMENT

(Filed Oct. 29, 2002)

AND NOW, on this 28th day of October, 2002, upon consideration of the order of the court dated 10/28/02, judgment is entered in favor of the defendant and against the plaintiff.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno J
EDUARDO C. ROBRENO J

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD R. WILLIAMS, ET AL., Plaintiff,	:	CIVIL ACTION NO. 00-1709
v.	:	
PHILADELPHIA HOUSING AUTHORITY, Defendant.	:	

MEMORANDUM

(Filed Dec. 20, 2002)

EDUARDO C. ROBRENO, J. December 18, 2002

I. FACTUAL BACKGROUND OF THE CASE[1]

Plaintiff, a former PHA police officer, brought suit against the PHA alleging unlawful retaliation, discrimination and failure to accommodate under the ADA. The plaintiff was temporarily suspended from PHA as a result of a heated altercation he had with a superior officer. Plaintiff's hiatus from PHA lasted from his suspension, on May 19, 1998, until he was fired, on December 29, 1998. During the period between plaintiff's suspension and subsequent termination, plaintiff underwent various psychological examinations. The examining psychologists concluded that plaintiff suffered from severe depression,

[1] A full recitation of the facts is set forth in *Williams v. Philadelphia Housing Authority*, 2002 WL 31496398 (E.D. Pa. October 28, 2002).

and that as a result, plaintiff should be prohibited from carrying a firearm for a temporary period of time.

Based on these events, PHA refused to allow plaintiff to return to work at PHA until plaintiff received medical clearance to carry a firearm once again. In turn, plaintiff requested that PHA allow him to work in a capacity where it would not be necessary to carry a weapon. PHA refused, citing safety concerns, and contending that plaintiff would have access to firearms in all available employment positions for which he was qualified at PHA.

After the altercation, plaintiff stopped coming to work. While out of work, plaintiff drew down all available medical leave to which he was entitled.[2] After he had exhausted all of his medical leave, plaintiff requested in writing and PHA granted a leave of absence on two occasions. After the second leave of absence expired, although directed to do so by PHA, plaintiff did not request any additional leave or otherwise contact PHA. As a result, his employment with PHA was terminated on December 29, 1998.

The court granted summary judgement in favor of PHA. In doing so, the court held, as to plaintiff's claim of retaliation, that: 1) plaintiff's retaliation claim, to the extent that it was based upon PHA's refusal to transfer plaintiff to the radio room, was stated as a retaliation claim, but was, in substance, a failure to accommodate

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[2] During the period between plaintiff's suspension and his psychological examination, plaintiff was instructed to report to work in the PHA radio room. PHA refused to allow plaintiff to work in the radio room only after PHA received the results of plaintiff's psychological examination.

claim and 2) as to plaintiff's claim of retaliatory termination, that plaintiff failed to produce sufficient evidence from which a reasonable jury could conclude that the defendant's proffered legitimate reason for plaintiff's termination was, in actuality, a pretext for retaliatory animus.

As to plaintiff's claim of discrimination under the ADA, including a claim of failure to accommodate, the court held that: 1) plaintiff was not disabled within the meaning of the ADA; 2) plaintiff was not "regarded as" disabled by the PHA within the meaning of the ADA; and 3) plaintiff did not have a record of a disability within the meaning of the ADA.

Plaintiff has filed a motion for reconsideration.

II. PLAINTIFF'S MOTION FOR RECONSIDERATION

A motion for reconsideration should only be granted when there is newly available evidence, an intervening change in controlling law or if the court committed manifest errors of law or fact and there is a need to prevent manifest injustice. *See NL Indus., Inc. v. Commercial Union Ins. Co.,* 65 F.3d 314, 324 n.8 (3d Cir. 1995); *Harsco Corp. v. Zlotnicki* 779 F.2d 906, 909 (3d Cir. 1985). Plaintiff does not allege the existence of newly discovered evidence or an intervening change in controlling law. Therefore, in order to succeed, plaintiff must establish that this court committed manifest errors of law or fact.

A) Plaintiff's Discrimination Claim

Plaintiff asserts that the court ignored alleged admissions of record by PHA that plaintiff was disabled because

PHA stated in its answer to plaintiff's complaint that they offered plaintiff a "reasonable accommodation." Plaintiff contends that the decision of the Supreme Court in *Barnett v. U.S. Airways, Inc.*, 122 S.Ct. 1516, 1523 (2002) stands "for the proposition that a federal court 'must assume' a plaintiff to be an individual with a known disability where the employer purports to have offered a reasonable accommodation." Plaintiff's Motion for Reconsideration at 15. Accordingly, plaintiff argues, that the court "disregarded governing law," resulting in factual and legal errors.

Plaintiff misinterprets the *Barnett* decision. The Supreme Court did not hold, as argued by plaintiff, that a court must always assume that an individual is disabled under the ADA whenever an employer uses the phrase "reasonable accommodation" in referring to voluntary concessions made to an employee. The issue before the Supreme Court in *Barnett* was whether, and to what extent, the ADA's requirement that disabled individuals be given reasonable accommodations is trumped by an existing seniority system. *See Barnett,* 122 S.Ct. at 1520. In other words, the inquiry made by the Court was whether the accommodation requested was "reasonable." *See id.* The Court "assumed" disability because the parties assumed disability not because the defendant simply used the term "reasonable accommodation." *See id.* at 1523.

Plaintiff is correct that defendant's use of the term "reasonable accommodation" was not discussed in the opinion and probably should have been. Such use of the term "reasonable accommodation" can serve as relevant evidence that defendant regarded plaintiff as disabled. However, the use of the term, in and of itself, does not show that defendants regarded plaintiff as suffering from

a disability that was any greater than was found in the court's opinion (i.e., being unable to work in a position in which he would have access to firearms or be around those carrying firearms). Merely pointing to the use of the term "reasonable accommodation" by the defendants fails to establish a manifest error of fact or law.

B) Plaintiff's Retaliation Claim

Plaintiff also objects to the court's holding that plaintiff failed to produce sufficient evidence from which a reasonable jury could conclude that the defendant's proffered legitimate reason for plaintiff's termination was, in actuality, a pretext for retaliatory animus. Plaintiff argues that such a holding is a manifest error for the following reasons:

1) The court found that plaintiff was terminated for failing to respond to PHA's directive that plaintiff apply for additional leave in accordance with PHA policy regarding leave, however, PHA never introduced the relevant policy;

2) the court relied solely on the temporal proximity between plaintiff's protected activity and his subsequent termination, and the Third Circuit has made clear that temporal proximity, by itself, cannot be a determinative factor;

3) PHA failed to articulate a legitimate non-retaliatory reason for plaintiff's termination because compliance with the PHA personnel policy regarding medical leave called for a physical impossibility. Moreover, physical impossibility is the reason why plaintiff did not comply. This is so because pursuant to PHA policy regarding medical leave, requests for medical leaves of absence

must be accompanied by a medical certificate from the employee's physician, because plaintiff's physician was of the opinion that plaintiff could return to work; and

4) the evidence shows that PHA had only required plaintiff to request additional leave or be terminated after plaintiff engaged in protected activity, insinuating that PHA did not adhere to that policy on a regular basis.

With regards to plaintiff's first argument, it is true that PHA never offered into the record the relevant provisions of PHA's policy regarding medical or any other type of leave to which it referred. However, PHA made numerous assertions that the requirement that plaintiff request an additional leave of absence after a previous leave had expired was in conformance with PHA policy. Plaintiff, however, filed five memoranda in support of his position on the cross-motions for summary judgment, yet never contradicted PHA's characterization of its personnel policy until this motion for reconsideration. In the absence of an allegation to the contrary, the court was free to accept PHA's position as uncontested.

With regards to plaintiff's second argument, the court did not rely solely on the temporal proximity between the protected activity and the adverse employment action, and explicitly stated so on pages 21-23 of the opinion. In fact, the court's finding was that plaintiff presented no evidence of retaliatory motive besides the temporal proximity of the two occurrences, and that that by itself was insufficient to support a finding of causation or pretext.

Plaintiff's third argument, which once again is being raised for the first time in the motion for reconsideration, also fails. Plaintiff had stated in depositions that he was fully aware that leaves of absence could be granted for any

reason, not just medical reasons. Moreover, plaintiff did not submit a medical certification with regards to his second leave of absence, yet one was granted. Finally, the PHA claimed to have fired plaintiff not just because he failed to request an additional *medical* leave of absence, but because of he failed to respond at all to PHA's directive.

With regards to plaintiff's fourth argument, it is true that PHA's *medical* leave policy was not consistently applied to plaintiff, but its *general* leave policy was. The general leave policy states that leave would be granted, "in special circumstances" by written request, *see* Defendant's Response, exhibit B, and defendant knew that leave was granted for any legitimate reason.

III. CONCLUSION

For the reasons set forth above, the motion for reconsideration will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD R. WILLIAMS, ET AL.,	:	CIVIL ACTION NO. 00-1709
Plaintiff,	:	
v.	:	
PHILADELPHIA HOUSING AUTHORITY,	:	
Defendant.	:	

ORDER

AND NOW, on this **18th** day of **October, 2002,** it is hereby **ORDERED** that plaintiff's motion for reconsideration (doc. no. 60) is **DENIED.**

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno J
EDUARDO C. ROBRENO J

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-1158

EDWARD R. WILLIAMS;
ANGELYNNE WILLIAMS, H/W

v.

PHILADELPHIA HOUSING
AUTHORITY POLICE DEPARTMENT

Edward R. Williams
Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 00-cv-01709)
District Judge: Hon. Eduardo C. Robreno

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, VAN ANTWERPEN, and STAPLETON,* *Circuit Judges*

The petition for rehearing filed by Appellee Phila Housing Authority in the above-entitled case having been

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* Hon. Walter K. Stapleton, Senior United States Circuit Judge for the Third Circuit, was a member of the original panel. His vote is limited to panel rehearing only.

submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: September 23, 2004

CMD/cc: Alex H. Pierre, Esq.
David E. Brier, Esq.
Patrick J. Harvey, Esq.

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

(2)

No. 04-873

IN THE

Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY POLICE DEPARTMENT,

Petitioner,

v.

EDWARD R. WILLIAMS AND ANGELYNNE WILLIAMS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ALEX H. PIERRE
1608 Walnut Street
Suite 1300
Philadelphia, PA 19103
(215) 844-8691

SCOTT L. NELSON
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

Attorneys for Respondents

February 2005

QUESTIONS PRESENTED

1. Whether the Third Circuit properly held that respondent Edward Williams' claims that petitioner violated the ADA by failing to accommodate both his actual and perceived disability were sufficient to survive summary judgment.

2. Whether the Third Circuit correctly decided that there was a genuine issue of fact as to whether Williams' impairment restricted his ability to perform a class of jobs.

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MISCELLANEOUS

H.R. Rep. No. 101-485(III), 1990 U.S.C.C.A.N. 445 16

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 9

INTRODUCTION

The petitioner asks this Court to grant certiorari in this case principally to resolve the question whether, under the Americans with Disabilities Act (ADA), an employer must reasonably accommodate an employee who is not actually disabled but is perceived by the employer to be disabled. That question, however, is not necessary to the decision of this case in its current interlocutory posture, because the court of appeals found the respondent had shown there was a material issue of fact over whether the respondent unlawfully had discriminated against him by failing to accommodate an *actual* disability as well as a perceived disability. Further proceedings on remand may well result in a final judgment in respondent's favor on the actual disability claim, or, conceivably, judgment against him on both the actual and perceived disability claims. In either event, it would prove unnecessary to decide the question petitioner advances in order to resolve this case.

Moreover, although petitioner asserts that there is a conflict among the circuits over the question whether the ADA entitles an employee with a perceived disability to be accommodated by his employer, none of the cases petitioner cites addresses the issue presented here: whether an employer violates the ADA by failing to accommodate an employee with an actual disability because the employer wrongly *perceives* the disability to be more severe than it is. None of the policy reasons (incorrect in our view) other courts have advanced for disregarding the language of the ADA and holding that a person with only a perceived disability is not entitled to accommodation applies in the unusual factual circumstances of this case.

Finally, petitioner's second question presented — whether respondent's inability to work in law enforcement positions constituted a substantial limitation on a major life activity — is a factbound question that has not been resolved definitively in this case, and the court of appeals' discussion

of the legal principles relevant to the determination of that issue does not conflict with any appellate decision cited by petitioner. For these reasons, which will be explained more fully below, the petition for certiorari should be denied.

STATEMENT

A. The ADA

The relevant provisions of the ADA are clear. The law forbids employment discrimination "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "disability" under the statute is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2). A "qualified individual with a disability" is an "individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphasis added).

Thus, if a person (i) has a disability and (ii) can perform the essential functions of employment with a reasonable accommodation, it is illegal to discharge him because of the disability. To make the point explicit, the law states that to "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless such accommodation would be an "undue hardship." *Id.* § 12112(b)(5)(A).

B. The Facts

Many of the facts of this case are disputed, and the disputes have not yet been resolved by a finder of fact. The opinion of the Third Circuit sets forth at length both the undisputed facts and the evidence that, viewed in the light most favorable to the respondent as non-movant, creates genuine issues of material fact as to whether the petitioner discrimi-

nated against him on the basis of both actual and perceived disability. We therefore summarize the facts only briefly here.

Respondent Edward Williams was a 24-year veteran police officer employed by petitioner Philadelphia Housing Authority (PHA) Police Department. Beginning in May 1998, following a confrontation with a superior officer, Williams was suspended from active duty. He was diagnosed as suffering from major depression and applied for a series of medical leaves.

By the fall of 1998, a PHA psychologist had concurred that Williams suffered from depression and should not be permitted to carry a weapon. The PHA's psychologist had, however, opined that Williams was capable of working in the department in some capacity and could work around other armed officers.

Following his evaluation by the PHA psychologist, Williams requested first that he be given an assignment in the training department, and then that he be assigned to the radio room. The PHA denied his first request, and instead of acceding to the second offered him only the choice of applying for additional unpaid medical leave or being terminated. When Williams did not apply for additional medical leave, the PHA fired him on December 29, 1998.

C. The Decision Below

Williams sued the PHA under the ADA and the Pennsylvania Humans Relations Act in the United States District Court for the Eastern District of Pennsylvania, alleging (among other things) that the PHA had violated the ADA by discriminating against him on account of disability when it fired him rather than reasonably accommodating his disability, and by retaliating against him for exercising his rights under the ADA (by requesting accommodation). Williams argued he was disabled within the meaning of the ADA both

because he actually was disabled and because he was regarded as disabled by the PHA.

The district court granted summary judgment on the ADA claims, holding that the retaliation claim failed because Williams had not presented evidence sufficient to create an issue of fact as to retaliatory motive, and that the discrimination claim was insufficient because, as a matter of law, Williams was not disabled. Williams appealed. The Third Circuit affirmed the grant of summary judgment against Williams on the retaliation claim, but reversed on the claim of discrimination.

With respect to the discrimination claim, the court held that Williams had presented sufficient evidence to create an issue of fact as to discrimination based on both actual and perceived disability. As to actual disability, the court found that Williams' evidence indicated he had a mental impairment, to wit, depression, which left him unable to carry a gun. The court of appeals held that a jury could find this inability precluded him from serving in most law enforcement jobs, and that this preclusion from a "class of jobs" substantially limited him in the major life activity of working.[1] The court further held that a jury could find on Williams' evidence that the nature and severity of his impairment and its duration or expected duration sufficed to qualify it as a disability under the ADA.

As for whether the PHA regarded Williams as disabled, the court held it was "clear" that although the PHA's own

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[1] Citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and the relevant EEOC regulation, 29 C.F.R. § 1630.2(j)(3)(i), the Third Circuit noted that exclusion from either a "class of jobs" or a "broad range of jobs" renders a person substantially limited in the major life activity of working. The court agreed with the district court that Williams had not shown exclusion from a "broad range of jobs," but held that there was a fact issue whether the limitations on his ability to perform law enforcement jobs excluded him from a "class of jobs."

psychologist had found Williams could work around officers carrying firearms, the PHA "perceived Williams as being unable to have *access* to firearms and to be *around others* carrying firearms." 380 F.3d at 766. Because the court had already decided there was an issue of fact as to whether Williams' *actual* impairment (depression making him unable to carry a firearm) restricted his ability to perform a class of law enforcement jobs, and because "[t]he additional limitations perceived by PHA, of course, only serve to further restrict the jobs Williams could perform in law enforcement," the court held that there was also an issue of fact as to whether the PHA regarded Williams as substantially limited in the major life activity of working. *Id.* at 767.

Having determined there was an issue of fact as to both actual and perceived disability, the court turned to whether Williams was a "qualified" person with a disability — that is, whether, "with or without reasonable accommodation," he could "perform the essential functions of the employment position." 42 U.S.C. § 12111(8). With respect to Williams' actual disability claim, the court held there was an issue of fact as to whether the PHA could have reasonably accommodated him with a temporary transfer to the radio room, because "[a] reasonable jury could ... conclude that Williams's actual limitations left him qualified to do radio room work." 380 F.3d at 769.

As for the alternative claim that Williams was "regarded as" disabled, the court again held the availability of a radio room transfer demonstrated the PHA could have accommodated Williams. The court acknowledged the PHA's argument that its misperception that Williams could not operate around officers carrying weapons led it to believe he was unqualified for a radio room transfer. But the court rejected the view that an employer could bootstrap its own misperception into a basis for denying an accommodation: "[i]f an employer believes that a perceived disability inherently precludes successful performance of the essential functions of a job, with

or without accommodation, the employer must be correct about the affected employee's ability to perform the job in order to avoid liability." *Id.* at 770 (quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3d Cir. 1999)).

Having determined Williams was "qualified" under either the actual disability or perceived disability theory because he could perform essential job functions with a reasonable accommodation, the court found there was an issue of fact over whether the PHA had discriminated against him, either by denying him the reasonable accommodation he had requested or by failing to engage in good faith in the "interactive process" necessary to determine if Williams was disabled and, if so, could be accommodated. 380 F.3d at 771-72.

Because one of the possible grounds on which Williams might prevail on remand was failure to accommodate a perceived disability, the court went on to address whether or not employees "regarded as" disabled are entitled to accommodation under the ADA. The court stated that "[w]hile we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text." 380 F.3d at 774. The court observed that the clear language of the ADA defined persons with disabilities to include persons "regarded as" disabled by their employers, and that the text made no distinction between actual and perceived disability with respect to the statutory ban on "not making reasonable accommodation to the ... mental limitations of an otherwise qualified individual." *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A)).

The court further noted that the legislative history of the ADA stressed the importance of protecting persons regarded as disabled just as much as those who actually are disabled. In support, it cited *School Board of Nassau County v. Arline*, 480 U.S. 272 (1987), where this Court long ago declared that,

under the parallel Rehabilitation Act, persons regarded as having an impairment must be reasonably accommodated by employers.

Finally, the court explained that, assuming Williams proved his case on remand, holding he was entitled to an accommodation for his perceived disability would in no sense provide him with a "windfall" (*id.* at 775-76):

> The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns — perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA. Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.

REASONS FOR DENYING THE WRIT

I. RESOLUTION OF THIS CASE DOES NOT REQUIRE DECISION OF THE PRINCIPAL ISSUE POSED BY THE PETITION, PARTICULARLY GIVEN ITS INTERLOCUTORY POSTURE.

Although it is not evident from reading the petition for certiorari, the question whether a plaintiff "regarded as" disabled is entitled to a reasonable accommodation was not dispositive of Williams' appeal and therefore need not be decided at this time. The Third Circuit held that there were genuine disputes of material fact as to both Williams' claim of discrimination on the basis of *actual* disability and his claim that PHA discriminated against him because it regarded him as being more disabled than he actually was. Even if the issue of accommodation for persons "regarded as" disabled were decided in the manner the PHA proposes, Williams would be entitled to precisely the same relief granted by the court below: Reversal of the district court's grant of summary judgment and remand for further proceedings because of the district court's error in not recognizing the genuine factual dispute as to actual disability.

Moreover, the Third Circuit held that Williams had stated a claim of discrimination (for either actual or perceived disability) based not only on failure to accommodate him, but also, and separately, on the PHA's failure to engage in good faith in the "interactive process" required under the ADA to determine whether an individual is subject to a disability and, if so, entitled to accommodation. *See* 380 F.3d at 772. Notably, petitioner does not dispute that persons who are "regarded as" disabled are entitled to have their employer engage in the interactive process in good faith. Pet. 14-15. Thus, regardless of the accommodation issue, Williams was entitled to a reversal of the summary judgment against him on this ground as well.

The remand proceedings yet to come may result in any number of possible dispositions of this case: Judgment for Williams on the actual disability claim; judgment for Williams on both actual and perceived disability claims (since, in his case, the two are not inconsistent); judgment for Williams on the perceived disability claim only; or judgment for the PHA on both claims. Favorable judgments for Williams may ultimately be based on either the accommodation claim, the interactive process claim, or both. Under several of the possible outcomes, the issue whether a person "regarded as" disabled is entitled to accommodation would be completely irrelevant to the final resolution of the case. Moreover, the remedies to which Williams may ultimately be entitled may be the same regardless of which theories (actual or perceived disability, failure to accommodate or failure to engage in the interactive process) are successful.

In addition, even assuming that the ultimate resolution of the case were to depend in whole or in part on the question of accommodation for perceived disability, a definitive resolution of that question would benefit from a complete factual record as well as actual findings with respect to the nature of Williams' actual and perceived disabilities. Thus, even if the Court were inclined to believe the question of accommodation of perceived disability merited its review, it should await a case where the question was presented on appeal from a final judgment.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). The Court ordinarily limits review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (citing cases). Here, where the Third Circuit has ruled only that there are sufficient issues of

fact to survive summary judgment on both actual and perceived disability, there is no immediate need for review. Indeed, stepping in now only will delay resolution of a case in which the actual disability issue will remain to be litigated in any event.

II. THE CLAIMED CONFLICT AMONG THE CIRCUITS DOES NOT ADDRESS THE PARTICULAR FACTS OF THIS CASE.

In asserting there is a conflict among the circuits over the issue of accommodation for persons "regarded as" disabled, the PHA cites cases from other circuits addressing circumstances in which a person who is *not disabled* claims that he was entitled to accommodation because his employer regarded him to be so. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999); and *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998).[2] Those decisions rested in large measure on the courts' policy view that application of the ADA's plain language in this context would lead to the "bizarre" result that "impaired employees would be better off under the statute if their employers treated them as disabled even if they were not," and that "it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability." *Kaplan*, 323 F.3d at 1232.

Regardless of whether these courts are correct in concluding the statute can be rewritten judicially to exclude accom-

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[2] In *Kaplan*, there was no claim of actual disability but only a perceived disability based on a misdiagnosis of the plaintiff's condition. *See* 323 F.3d at 1231. In *Weber*, the court of appeals held that there was no issue of fact as to actual disability. *See* 186 F.3d at 914. And in *Newberry*, the plaintiff relied "only on a perception of disability." 161 F.3d at 279. The PHA also cites *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999), but acknowledges that the discussion of the accommodation issue in that case was dictum.

modation of persons who are not actually disabled but are so regarded by their employers, this case does not present that issue. Williams' fundamental claim is *not* that he was not actually disabled but was wrongly regarded as such by his employer, but that he *was* actually disabled but was denied the accommodation he sought from the PHA because the PHA wrongly regarded him as being *more* disabled than he actually was. In other words, Williams — unlike the plaintiffs in the cases cited by PHA — would have been entitled to an accommodation even if the PHA correctly perceived his abilities, because a correct perception would have been that he was disabled, but not so disabled as to render him incapable of being accommodated. Thus, Williams in no sense seeks a "windfall," and the considerations that have led other courts to deny the right to accommodation to persons not actually disabled but only regarded as such do not apply to him. Indeed, in this case the windfall would be to excuse the PHA from accommodating Williams because it wrongly perceived him to be more disabled than he was.

Thus, in ruling for Williams, the Third Circuit was not required to, and did not, reject outright the "possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results.'" 380 F.3d at 774. Rather, it held only that on the facts of this case, "a literal reading of the Act will not produce such results," and accordingly it held that it would "remain faithful to [the Act's] directive *in this case.*" *Id.* (emphasis added). The PHA cites no cases addressing similar facts and holding that a person who is actually disabled, but also wrongly regarded as being even more disabled, is not entitled to reasonable accommodation. Thus, the conflict the PHA cites is not presented on the specific facts of this case.

Indeed, the one case the PHA cites that includes some discussion of this issue, *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7th Cir. 2004), itself recognizes there

may be a distinction between cases where the misperception is about whether a disability exists or not, and cases where the misperception is about the *extent* of an actual disability. Thus, the court observed:

> Being regarded as disabled is a form of disability under the statute and thus could in principle trigger a duty to accommodate, but *what* must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee? ... The extent to which employers' errors in appreciating the extent of their workers' *real disabilities* create obligations to accommodate can be left for another day ....

Id. at 335-36 (second emphasis added).

In the absence of conflicting decisions addressing the precise issue of an employer's obligation to accommodate an employee who is actually disabled but wrongly perceived to be even more disabled, this Court, too, can leave the issue for another day.

III. THE DECISION OF THE THIRD CIRCUIT IS CORRECT.

The Third Circuit's reading of the ADA as requiring reasonable accommodation of employees who are "regarded as" disabled is substantively correct. Even courts that have refused to require reasonable accommodation for employees "regarded as" but not actually disabled have acknowledged that the plain statutory language carves out no such exception:

> On the face of the ADA, failure to provide reasonable accommodation to "an otherwise qualified individual with a disability" constitutes discrimination. 42 U.S.C. § 12112(b)(5)(A). And, on its face, the ADA's definition of "qualified individual with a disability" does not differentiate between the three alternative prongs of the

> "disability" definition. 42 U.S.C. §§ 12102(2), 12111(8).

Kaplan, 323 F.3d at 1230.

To be sure, *Kaplan* goes on to assert that "[t]he absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations." *Id.* But the Ninth Circuit's assertion that the statute encompasses no "explicit instruction" that "regarded as" individuals are entitled to accommodation is untenable. The statute clearly instructs that failure to accommodate a qualified individual with a disability is discrimination, and it equally clearly outlaws discrimination against a qualified individual with a disability. 42 U.S.C. §§ 12112(a), 12112(b)(5). It defines disability to include being regarded as disabled, and it says that a person who has a disability (whether actual or "regarded as") and who can perform the essential functions of employment *with or without accommodation* is a qualified individual with a disability. 42 U.S.C. §§ 12102(2), 12111(8). As the Third Circuit observed below, "all would agree" that the plain language of the ADA does not permit the distinction the PHA wishes the Court to draw. 380 F.3d at 774.

Since none of the cases denying accommodation to employees perceived as but not actually disabled cites language in the statute to support such an interpretation, the PHA relies on a single law review article to support a convoluted reading of the statute as ambiguous. Pet. at 10-11. The PHA's proposition is summed up in its assertion that "[a]n employer who fails to accommodate a non-disabling impairment does not discriminate 'because of the disability' because the non-disabling impairment is not the basis of the individual's protected status." Pet. at 11. This statement, if comprehensible at all, is obviously incorrect. In the case of a perceived disability, the "basis of the individual's protected status" is that he is "regarded as disabled" by the employer, and when the employer discriminates against him by failing to accommodate

that perceived disability, the employer is discriminating based on the very perception of disability that is precisely "the basis of the individual's protected status."

Petitioner further purports to find support in the "legislative intent" but points to nothing in the legislative history remotely suggesting Congress did not mean what it said when it required accommodation of qualified individuals with disabilities, regardless of whether those disabilities were actual or perceived.

Nor does petitioner come to grips with the fact that this Court, construing the analogous Rehabilitation Act, already has held that under that Act, a person who is perceived as disabled is just as entitled to full protection against discrimination, including reasonable accommodation, as a person who actually is disabled. *School Board of Nassau County v. Arline*, 480 U.S. at 279, 284-85, 289. The PHA's only attempt to deal with *Arline* is a footnote stating that, according to a law review article, *Arline* did not address perceived disability — an assertion a cursory review of the opinion clearly refutes. *See id.* at 284-85.

Finally, the PHA, echoing the Ninth and Eighth Circuits, asserts that accommodating an employee who is "regarded as" but not actually disabled would grant him an undeserved "windfall" by giving him protection he or she would not receive if the employer correctly had regarded him or her as not disabled. We already have explained that this theory, even if correct, does not apply to *this case* because Williams claims that he was both actually disabled and "regarded as" even more disabled than he actually was. In any event, the "windfall" contention is selective, to say the least, as a basis for singling out accommodation as a protection that should be denied to persons "regarded as" disabled under the ADA, even while other protections continue to be provided.

Providing *any* protection to a non-disabled person who is regarded by his employee as disabled obviously gives that person something he would not have if the employer cor-

rectly perceived him as non-disabled. For example, assume that an employer incorrectly regards someone who has a mild skin disorder as disabled. The employee is in fact capable of performing his essential job function *without accommodation*, but the employer nonetheless fires him because he perceives him as disabled. No one would argue that the statute permits such discrimination. At the same time, however, absent the employer's misperception, it could freely have terminated the employee with no concern about possible liability under the ADA. Thus, if the "windfall" concern about accommodation were valid, it would be equally applicable to overt discrimination against "regarded as" employees who do not require accommodation. In short, the "windfall" theory proves too much because the purported "windfall" is only that the "regarded as" employee receives the same protection as an employee who actually is disabled — exactly what Congress plainly intended in enacting the ADA. *See* 380 F.3d at 774.

Moreover, much of the concern about possible "windfalls" stems from speculation about whether an employer will have to *continue* to accommodate an employee even after the employer has been "disabused" of its misperception and no longer regards the employee as disabled. *See Weber*, 186 F.3d at 907 (citing *Deane v. Pocono Med. Center*, 142 F.3d 138, 148-489 n.12 (3d Cir. 1998)). Whether or not an employer must *continue* to accommodate an employee it *no longer* regards as disabled never has been at issue in any of the cases, and certainly is not at issue here.[3] Were the question ripe for adjudication, the plain language of the ADA an-

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[3] Whether it would be an appropriate remedy to force an employer, on an ongoing basis, to accommodate an employee it now knows is not disabled is a very different question from whether the employer should be held liable in the first instance for terminating rather than accommodating an employee it believed to be disabled. *See Workman v. Frito-Lay, Inc.*, 165 F.3d at 468 (remanding for a determination of how to accommodate plaintiff's "evolving" condition).

swers it in the negative, because the employee by definition would cease to be disabled upon the employer's being divested of its misperception. The more pertinent question is whether it is lawful for an employer to terminate an employee it continues to regard as disabled rather than offer him a reasonable accommodation. Holding that failure to accommodate a perceived disability is unlawful in such circumstances no more grants the employee a "windfall" than does providing that an employer may not discriminatorily terminate an employee whom it regards as disabled but who does not require an accommodation. As the Third Circuit correctly recognized, in both cases, the statute achieves its basic purpose of providing protection against irrational prejudice against persons who are viewed as disabled. *See* 380 F.3d at 774.

This Court emphasized the importance of such protections in *Arline*, where it stressed the need to accommodate individuals who have impairments that do not substantially limit their abilities but are perceived as doing so: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative actions of others to the impairment." 480 U.S. at 273. Extending full statutory protection to those who "are regarded as impaired and who, as a result, are substantially limited in a major life activity" ensures that employees "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others," and recognizes "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 274. Congress expressly acknowledged these statements in *Arline* when, in adopting the ADA, it extended full protection to persons "regarded as" disabled. *See* H.R. Rep. No. 101-485(III), 1990 U.S.C.C.A.N. 445, 453.

IV. THE "CLASS OF JOBS" ISSUE IS FACTBOUND AND DOES NOT MERIT RESOLUTION BY THIS COURT.

Almost as an afterthought, the PHA also requests that this Court grant certiorari to consider whether the Third Circuit correctly has held there is an issue of fact as to whether Williams' disability (and perceived disability) substantially restricted him in his ability to perform a "class of jobs" — namely, jobs in law enforcement. The Third Circuit, of course, did not hold that Williams had proven his case on this point: It merely held that the PHA had not demonstrated that there was no issue of material fact as to the extent of the jobs from which Williams was foreclosed and whether it was broad enough to constitute a "class of jobs." Whether the Third Circuit was correct in holding that there was enough of a dispute to foreclose summary judgment against Williams is the classic example of a factbound question of no broad significance.

Attempting to conjure up some broader legal issue meriting this Court's attention, the PHA contends the Third Circuit's holding that the field of law enforcement may constitute a class of jobs is inconsistent with this Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). There the Court held that inability to perform the specific job of "global airline pilot" did not limit an employee in the "major life activity of working" because a number of closely related jobs in the same general field remained available. *Id.* at 493. The Third Circuit did not ignore or disregard the Court's ruling in *Sutton*; rather, it acknowledged *Sutton*'s holding but distinguished the case because there was evidence that Williams, unlike the plaintiffs in *Sutton*, was broadly barred from "most law enforcement positions so long as his condition persisted." 380 F.3d at 765. Whether the Third Circuit was correct in finding that this case is potentially distinguishable from *Sutton* on the facts (depending, of course, on what facts are ultimately shown) is hardly an issue warranting review.

See S. Ct. R. 10 (a petition is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

The PHA also maintains that the Third Circuit's holding conflicts with the Eleventh Circuit's holding in *Rossbach v. City of Miami*, 371 F.3d 1354 (11th Cir. 2004). But the facts in *Rossbach* were patently different from those in this case. There, the plaintiffs were not precluded from all or even most law enforcement jobs; in fact, they were working as light or limited duty police officers. Their impairments barred them only from one specific job: that of a "combat-ready police officer." *Id.* at 1359. Like the Third Circuit in this case, the Eleventh Circuit held that the legal standard for determining whether the plaintiffs were substantially limited with respect to the major life activity of working was whether they were foreclosed from either a "class of jobs" or a "broad range of jobs." *Id.* at 1360. The Eleventh Circuit found that preclusion from only one job (combat-ready police officer) did not satisfy that standard. *Id.* That holding is fully consistent with the Third Circuit's holding in this case that inability to perform all or most jobs in law enforcement constitutes an impairment with respect to a "class of jobs" and, thus, is a substantial limitation on the major life activity of working.

In short, *Rossbach* does not suggest a conflict among the circuits on an important legal question. It only illustrates that application of the same legal standard to different facts yields different results.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-7724

ALEX H. PIERRE
1608 Walnut Street, Suite 1300
Philadelphia, PA 19103
(215) 844-8691

Attorneys for Respondents

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